FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DECISIONS

August 1983

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

AUGUST

The following cases were Directed for Review during the month of August:

Secretary of Labor, MSHA v. Southwestern Illinois Coal Corporation, Docket No. LAKE 82-38. (Judge Broderick, June 30, 1983)

Secretary of Labor, MSHA v. Earth Coal Company, Docket No. LAKE 83-32. (Judge Merlin, Default Decision, June 28, 1983)

James Eldridge v. Sunfire Coal Company, Docket No. KENT 82-41-D. (Judge Koutras, July 11, 1983)

Review was Denied in the following cases during the month of August:

Secretary of Labor, MSHA v. Monterey Coal Company, Docket Nos. LAKE 80-413-R, LAKE 81-59. (Petition for Reconsideration of Commission Decision, June 13, 1983)

Secretary of Labor, MSHA v. Monterey Coal Company, Docket Nos. LAKE 82-82-R, LAKE 82-97. (Judge Koutras, June 6, 1983)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 4, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 83-32
EARTH COAL COMPANY, INC.	:	

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by the operator on July 27, 1983 is granted. We find the order of default entered by the chief administrative law judge to have been appropriate under the circumstances then before him. However, the operator, who is pro se in this matter, has made statements in the petition for review which the judge has not had an opportunity to evaluate. Accordingly, the case is remanded to the chief administrative law judge for such proceedings as he may deem appropriate, including but not limited to actions to ascertain and evaluate the operator's reasons for failing to respond to the judge's April 26, 1983 Order to Show Cause.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

A. E. Lawson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 5, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 81-45-M
INVERNESS MINING COMPANY	:	

DECISION

This civil penalty case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), presents the question of whether a Commission administrative law judge appropriately approved the parties' settlement motion. 1/ The operator, Inverness Mining Company, filed a petition for discretionary review complaining of various statements in the judge's decision. For the reasons that follow, we affirm the judge's settlement approval as hereinafter modified.

Inverness operates an underground fluorspar mine in Illinois. On August 4, 1980, a non-fatal roof fall accident occurred towards the end of the second shift at the mine. A miner received injuries when a slab of shale fell from the back or face of the drift in which he was working. It appears that during the preceding shift, the back and ribs of the drift had been scaled or barred down--that is, loose shale had been scraped away. The back was bolted up to the working face. It is not clear whether the miners on the second shift engaged in any testing, barring, or scaling in the drift, although they did visually examine ground conditions. Conflicting pretrial statements were submitted concerning the condition of the back and the face during the second shift.

The day following the accident, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) arrived to conduct an accident investigation. At the conclusion of his investigation, the MSHA inspector issued to Inverness a section 104(a) citation, alleging a violation of 30 C.F.R. § 57.3-22, a ground control standard, in

1/ The judge's decision is reported at 3 FMSHRC 2576 (November 1981) (ALJ).

connection with the accident. 2/ The citation states in part, "The back of the drift was not tested before the beginning of the work shift or any time during the work shift." During his investigation the inspector obtained oral statements from the victim, his co-worker, and the second shift foreman. The gist of these statements was that no barring or scaling had been done during the second shift, that the shale looked pretty good, but that it was always hard to tell whether shale was in fact as good as it looked.

During the close-out conference at the conclusion of the investigation, the inspector informed Inverness management officials of his intention to issue a citation for failure to test the back during the second shift. According to the inspector's field notes memorandum, the mine manager and the mine superintendent exchanged words with the inspector concerning the citation. The inspector's memorandum states in part:

> At the close out confer[e]nce ... [the mine manager] said that I was out of line and that he was going to take this to court and that he was going to call my superviso[r]. I told him that it was all right with me if he took the citation to court. He ask[ed] me if I had ever worked around shale. I told him that I had worked around shale a lot and that [is] why I knew that you can not tell if the top is good just by looking at it. [The mine superintendent] said that the roof was checked by the foreman before the shift started. I told him that the foreman by his own statement said that he checked the roof by looking at it, not testing it. [The superintendent] said that he did not think it was right for me to give them a citation and looked and sounded mad....

The inspector's subsequent formal accident report notes, however, that the "cooperation of company officials and employees during this investigation is gratefully acknowledged."

On January 5, 1981, MSHA filed with the Commission its proposal for a penalty, seeking a penalty of $2,500 for the alleged violation. The narrative findings for a special assessment, attached to the proposal, allege that the gravity of the violation was serious and that the violation resulted from the operator's negligence. Inverness filed an answer, denying that it had violated the standard.

2/ Section 57.3-22 provides:

Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

On February 6, 1981, the Commission administrative law judge issued a notice of hearing and pretrial order which required the parties to make extensive submissions of information relevant to the case. In its first response, Inverness contended that the back, ribs, and face of the drift had been examined, tested, and scaled down prior to the accident. The operator submitted a number of signed and notarized statements from its employees obtained by Inverness' safety director.

In his statement, the victim claimed that there "was no loose stuff on the walls whatsoever," that he and a co-worker made "a visual inspection of everything" when they started work, and that "you could tell definitely that [the area] had been scaled down, and there was no loose shale or rock hanging anywhere ... that you could see." A statement from the foreman on the preceding shift indicated that during that shift, scaling and barring were done in the drift. In his statement, the second shift foreman stated he "inspect[ed]" the drift at the start of his shift, that the drift "was bolted right up to the working face," and that there "was no loose material hanging anywhere." Finally, Inverness submitted the daily work inspection log, which includes notations that preshift and onshift inspections were made in the drift in question.

On October 13, 1981, following the various submissions summarized above, the parties filed a jointly signed motion to dismiss and approve settlement. The motion proposed an "agreed penalty" of $1,000. The parties also stipulated that respondent demonstrated "ordinary or low negligence." The parties made the following representations:

> The company inspected the mine on a preshift inspection and on a shift inspection as evidenced by the company records presented in response to the Court's pretrial order. This page was copied from the Work Inspection Log of Inverness....
>
> The statements ascertained by both [MSHA] and Inverness ... are replete with contradictions. The Accident Investigative Report concludes the cause of the accident was the failure of the miners to examine and test the back and face of the drift and the failure of the operator to insure that this was done. A reading of the transcriptions of the tapes [of oral statements] indicates that the face looked "pretty good, and the injury occurred when [the victim's co-worker] scratched the rock in one of the holes."
>
> Every statement submitted by respondent conflicts with the original statements made at the time of or near the day of the accident. Each statement received from the employees indicates that the drift had been scaled down with the heading roofbolted ... up to the working face which is contradictory to the citation itself which states that the back of the drift was not tested before the beginning of the work shift.

After the judge received the parties' motion, he engaged in telephone conversations with counsel for Inverness. In those conversations, he indicated that he would not approve a $1,000 penalty and suggested a $1,500 penalty instead. On October 31, 1981, Inverness' counsel sent the judge a letter in which he stated:

> Pursuant to our previous telephone conversation, I am hereby confirming that the Inverness Mining Company agrees to settle this matter by payment of a $1,500 penalty rather than the $1,000 mentioned in the Motion to Dismiss....

The judge granted the settlement motion, approved a $1,500 penalty, and dismissed the case. In the course of granting the relief sought and agreed to by the parties, the judge expressed certain opinions that are the subject of Inverness' petition for review. First, the judge attributed the accident mainly to managerial production pressure and a lax attitude towards safety:

> The accident investigation established that at the beginning and throughout the shift the miners and their supervisor were at all times aware of the fact that there was questionable shale at the back of the drift, but that due to the pressure to catch up with production the miners and their supervisor decided to take a chance that it could be worked without testing. That this was in accord with the policy of top management was established by the angry reaction of the plant manager ... and the superintendent ... to the inspector's decision to issue the citation. It is just this "take a chance" attitude toward safety that leads to so many fatal and disabling accidents.... Here experienced miners were encouraged to ignore sound safety practices because the top management of a new operation was pushing for production.

3 FMSHRC at 2576.

Second, the judge accused the operator of questionable litigation tactics:

> Top management's attitude alone justified the penalty of $2,500 originally proposed. Because of the effort made to muddy the waters, MSHA proposed a settlement of $1,000 or 40% of the amount initially proposed. The trial judge rejected this and suggested $1,500. This proposal was accepted by counsel for the operator on October 31, 1981.
>
> ... [I]t is my opinion that this operation bears close scrutiny and that unless top management's attitude changes serious violations will continue to occur. I will expect that the next time around the Solicitor will recognize that miners who are induced to contradict their contemporaneous statements are still

> reliable witnesses of what actually transpired and that little weight is to be accorded self-serving afterthought statements elicited under pressure from the operator.

3 FMSHRC at 2576-77.

Inverness ultimately asks the Commission on review "to set aside the decision and order entered by the [judge] insofar as his conclusions are inconsistent with the motion to dismiss and approve settlement." Petition at 9 (emphasis added). Inverness does not request the Commission to reduce or to vacate the $1,500 penalty. 3/

We have examined the record, the salient portions of which are summarized above, and fail to find evidentiary support for the judge's critical comments. No statement lends support to his observation that this particular operator had a "take a chance" attitude towards safety out of its desire or policy to increase production. The "angry" reaction of company officials to the citation seems nothing more than the exchange of disagreements to be expected at many close-out conferences. Certainly, operators have the right to take MSHA "to court." The inspector himself in his accident report expressly thanked Inverness officials for their cooperation with his investigation. Similarly, there is nothing in the record that indicates Inverness' employees were "pressured" to change their statements in an effort "to muddy the waters." The statements do conflict, but only trial and cross-examination could have revealed the credibility of the employees and the veracity of their various statements. Accordingly, we disapprove and strike, for lack of record foundation, the judge's criticisms of the operator's safety attitudes and litigation tactics contained in the passages from the three paragraphs of his decision quoted above.

3/ The operator states that "it is interesting to note the circumstances under which [the] $1,500 [penalty] was arrived at." Petition at 2. Inverness points to its request that the hearing be held in Indiana, and then refers to the judge's telephone calls on the subject of settlement. The operator alleges that the judge "suggested" a $1,500 penalty "or else a prehearing conference would be held in Washington, D.C., and thereafter a hearing would be held in Washington, D.C. The Inverness Mining Company, recognizing the economics of the 'choice' that [the judge] 'suggested,' reluctantly consented to a $1,500 settlement figure." Petition at 2-3. After review was granted, the judge filed with the Commission his own affidavit, in which he denied pressuring Inverness to settle. Inverness does not present any due process argument in connection with this incident. While we need not address this matter in detail, it illustrates the risk of possible misunderstandings, conflicting interpretations, and differing recollections, resulting from a judge's telephonic communications on such matters with one party off the formal record. Such a practice is not condoned or approved by this Commission. See generally Knox County Stone Co., Inc., 3 FMSHRC 2478 (November 1981).

No party objects to the remainder of the judge's decision, and it is supported by the record. The parties agreed to a $1,500 penalty and, among other things, stipulated to the operator's negligence. The mine did not have a significant prior history of violations. Based on our review of the record, we conclude that the penalty is consistent with the six statutory penalty criteria. 30 U.S.C. § 820(i)(Supp. V 1981). Therefore, we affirm the judge's settlement approval on the narrow grounds on which it actually rests.

For the foregoing reasons, we affirm the judge's approval of the $1,500 penalty in settlement of this case as modified.

Rosemary M. Collyer, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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August 8, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
EX REL. BENNETT, COX, ET AL.	:	Docket No. WEST 80-489-D(A)
UNITED MINE WORKERS OF AMERICA, Intervenor	:	
v.	:	
EMERY MINING CORPORATION	:	

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), and involves the interpretation of sections 115 and 105(c) of the Act. An administrative law judge of this Commission determined that section 115(b) imposed an obligation on operators to provide and pay for new miner training and, as a corollary, granted miners a statutorily protected right to receive training. He concluded that Emery's policy of requiring job applicants to have 32 hours of miner training as a qualification for employment denied them their right to receive such training, and discriminated against them in violation of section 105(c) of the Act. 1/

For the reasons that follow, we affirm the judge's conclusion that Emery violated the Mine Act, but do not agree with his determination that Emery's hiring qualifications policy constituted a per se violation of the Act. Rather, we hold that Emery violated the Act by refusing to reimburse the complainants for wages for the time spent in training and the cost of their training, while relying on that training, following their employment by Emery, to fulfill the requirements of section 115.

The facts in this case are uncontroverted. The twelve complainants are employed as underground miners by Emery Mining Corporation.

1/ The judge's decision is reported at 3 FMSHRC 2648 (November 1981) (ALJ). After the hearing before the judge, the Secretary was granted leave to amend his complaint to add 127 complainants. The judge then severed the amended complaint from the present case and assigned it docket number WEST 80-489-D(B). 3 FMSHRC at 2659-60. That case is now pending before the administrative law judge.

As a pre-condition for employment, Emery required completion of 32 hours of safety training for underground miners at an MSHA-approved miners' training course. 3 FMSHRC at 2650. 2/ Emery did not reimburse those hired either for the cost of the training or pay wages for the hours spent in training. Emery did, however, rely on the training that new hires had acquired, at their own expense, to satisfy the training requirements of the Mine Act.

Emery's policy of accepting applications only from those who had completed a training course began January 1, 1980. Prior to that time, Emery sent newly hired miners to the College of Eastern Utah for training, and gave the requisite further training at Emery's facilities. 3 FMSHRC at 2653. The judge found, "The new policy was that no person would be hired unless he had completed a new miner orientation program through an MSHA approved institution (Tr. 82)." 3 FMSHRC at 2654. 3/ The judge further found, "The reason for Emery's change in personnel policy was to screen out those persons who weren't interested in a mining career and thereby reduce the turnover rate (Tr. 89, 96)." Id.

The complainants in this case successfully completed the training courses at their own expense. The record shows the costs to eight of the complainants for tuition as well as estimates of their transportation expenses to and from the courses. 3 FMSHRC at 2651-54. For two of the twelve complainants, the cost of motel rooms and meals is in the record, and another of the complainants testified to the cost of four lunches. 3 FMSHRC at 2652. Upon completion of training, Emery checked the complainants' references and, after physical examinations, they were hired. 3 FMSHRC at 2650. The starting wage for each complainant is in the record.

The judge first examined section 115 of the Mine Act and the legislative history relating to miner training in order to determine the statutory rights granted to miners by that section, and whether Emery's policy was in violation thereof. 4/ He concluded that section 115 places

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2/ In addition to notifying applicants for employment who came directly to the mine of its policy, Emery also notified the State of Utah's Job Service which often referred job applicants to Emery. Of the complainants in this case, five went to Emery and were informed of its policy, and three went to Job Service and were told there that 32 hours of miner training was required. There is no information on this point concerning the four remaining complainants.

3/ Emery had experienced a high turnover rate of 48% during 1979 among its inexperienced miners. Emery hired 450 miners and 190 terminated in the first 3 months. The judge found that the turnover rate was reduced to 25% after January 1980, but also found that the evidence did not reveal the exact cause of the reduction.

4/ Section 115 states in part:

> (a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. ... Each training program approved by the Secretary shall provide as a minimum that -

(Footnote continued)

the responsibility for, and the cost of, training miners on the operator. The section also requires that new miners be provided with 40 hours of training. The judge held that by requiring its prospective miners to obtain 32 hours of pre-employment training, Emery left itself responsible for only eight hours of training, and improperly shifted the burden of those 32 hours of training to the complainants. 3 FMSHRC at 2654-55, 2659. The judge further held that the requirements of section 115(b) were not satisfied by Emery because the complainants did not receive any compensation while they attended their training courses, and were not reimbursed for costs of attending the training. 3 FMSHRC at 2655. The judge found that the legislative history of the Mine Act supported his interpretation of section 115. He held that Emery's policy "clearly violate[d] section 115 of the Act." 3 FMSHRC at 2659.

The judge next considered whether the company's policy "constitute[d] a discriminatory practice under Section 105(c) of the Act." 3 FMSHRC at 2656. 5/ The judge held that the complainants were "applicants

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Fn. 4/ continued

> (1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground.
>
> (b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

5/ Section 105(c)(1) provides in part:

> No person shall discharge or in any manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, ... or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer ... or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

for employment" under section 105(c). 3 FMSHRC at 2656-57. He noted the broad scope of the discrimination section and its express inclusion of "applicants for employment" in its coverage. The judge held that the statutory right to safety training and compensation is therefore protected from interference by section 105(c) of the Act, and Emery discriminated against the complainants by requiring them to secure training on their time at their expense. 3 FMSHRC at 2657.

The judge awarded each miner compensation at his starting rate for the four days of training, the amount of tuition paid, and the expenses incurred in taking the training course plus 12.5% interest. A penalty of $1,000 for the violation of section 105(c) was assessed also. 6/

We granted Emery's petition for review, and allowed the United Mine Workers of America to intervene. Oral argument was heard before us on October 20, 1982. The questions on review are: What rights are granted to miners by section 115 of the Act; whether Emery interfered with those rights in violation of the Act; and, if interference is shown, what remedy is due the complainants. We turn to examination of the first two issues, and will address the remedy separately.

Section 115 sets forth miner training requirements under the Mine Act. It neither dictates whom an operator should hire, nor refers to qualifications for hire. Indeed, the parties and the judge agree than an operator could hire only experienced miners and not run afoul of section 115. In this case, however, we are concerned specifically with section 115's requirements for training "new miners."

Section 115(a) requires operators to have an approved health and safety program that provides 40 hours of training to "new miners" who will work underground. It also mandates that an operator who hires new miners pay them at their "starting wage rate" while they are being trained, and compensate them for "additional costs" incurred in receiving training away from the mine. Section 115(b). Section 115 does not refer to a new miner's duty to obtain training but rather to an operator's responsibility to provide it. 7/ The legislative history of this section also demonstrates that the responsibility to ensure that new miners are trained unquestionably is imposed by statute upon the operator. See S. Rep. No. 181, 95th Cong., 1st Sess. 50 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 638 (1978)("Legis. Hist"); S. Conf. Rep. 461, 95th Cong., 1st Sess., 61-63 (1977), reprinted in Legis. Hist. 1339-41. Further, this section imposes a duty on the operator to see that new miners are trained before they begin their mining tasks. See National Indus. Sand Ass'n. v. Marshall, 601 F.2d 689, 710 (3d Cir. 1979).

6/ No issues concerning the rate of interest assessed on the awards or the penalty are presented on review.

7/ Similarly, section 104(g) of the Mine Act protects from retaliation miners who are discovered working without the required training; it also requires an operator to pay a miner removed from the mine under 104(g) while that miner receives the necessary training.

We conclude that section 115 grants two separate, related rights to new miners: To receive 40 hours of safety training before working underground and to be compensated for the time and expenses of that training by the mine operator. The right to training is assured by section 115(a). The right to compensation for the time and expenses of training is specifically provided in section 115(b). As we discuss more fully below, failure to compensate miners for the time and costs of training relied upon by an operator to fulfill its statutory obligations interferes with the new miners' rights. Here the complainants had been hired by Emery and worked in Emery's mine. They were all inexperienced miners when they took the training course and Emery was their first employer after they received safety training. Thus, once hired, they became new miners under the Act entitled to the rights granted by section 115(a) and (b).

Section 105(c)(1) of the Mine Act prohibits interference with rights provided by the Act, including rights provided under section 115. The Senate Committee on Human Resources, which largely drafted the bill that became the Mine Act, specifically mentioned safety training in discussing the discrimination section of that bill:

> The Committee also intends to cover within the ambit of this protection any discrimination against a miner which is the result of the safety training provisions of section 11[5] or the enforcement of those provisions under section 10[4][g].

Legis. Hist. 624. Further, as we noted in Moses v. Whitley Development, 4 FMSHRC 1475, 1478 (August 1982), Congress expressed in the same passage of legislative history its intention that section 105 protect miners "not only against the common forms of discrimination, such as discharge, suspension, demotion ..., but also against the more subtle forms of interference...." Id. Thus, section 105(c) prohibits denial of or interference with the right to receive safety training. We next consider the specific question of whether Emery interfered with these complainants' rights by requiring them to obtain training prior to applying for employment, and by relying on, and refusing to reimburse them for, their training after hiring them.

Initially we note our divergence from the judge's conclusion that Emery's policy of requiring the training prior to employment violated the Mine Act. An employer has the right to choose its employees. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937). This principle has been stated succinctly as follows: "[A]n employer may exercise its right to refuse to hire for any reason or no reason at all as long as statutory or constitutional provisions are not violated." Carter v. Seaboard Coast Line Railroad Co., 392 F. Supp. 494, 499 (S.D. Ga. 1974). Further, statutes that potentially limit an employer's right to select its employees, for example Title VII, are not violated when an employer refuses to hire an applicant protected by such an Act because the applicant lacks bona fide occupational qualifications. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971). We believe that in

the Mine Act Congress did not restrict a mine operator's prerogative of setting pre-employment qualifications based on experience or training. Thus, Emery's policy of requiring inexperienced job applicants to obtain 32 hours of MSHA-approved training prior to hire does not violate the Mine Act.

Emery did, however, violate section 105(c) when, after hiring the complainants as new miners, it refused to compensate the miners for their 32 hours of training and yet relied on that training to satisfy its training obligations to them under section 115. Emery provided only eight of the forty hours of training required by section 115(a); the operator relied on the prehire 32 hours of training for which the complainants themselves had paid to comply with the full requirements of the Act. (Emery supplied the 8 hours of mine-specific training required by section 115(a)(5) and 30 C.F.R. § 48.5.) Emery thus attempted to discharge its statutory obligations by obtaining the "benefit" of the new miners' prehire MSHA training without reimbursing them for the cost of that training. This action circumvented the statutory mandate that operators provide and pay for new miners' training, and thus interfered with the new miners' rights under section 115 in violation of section 105(c)(1). If Emery's approach to compliance with section 115 were adopted throughout the mining industry, section 115 would effectively be read out of the Act and the cost of training would be shifted from operators to miners. In short, if Emery wished to rely on the prehire training to satisfy its statutory obligation to provide training for new miners, it must compensate the new miners for that training.

We emphasize that our decision is limited to the facts of this case: Emery was the first operator for whom these new miners worked upon completing their 32 hours of training; they undertook the prehire training because of Emery's hiring policies; the complainants were not reimbursed for their training after hire; and Emery took advantage of that unreimbursed training to attempt to comply with section 115. Emery, in effect, "provided" that training under section 115. Therefore, under section 115(b), Emery must reimburse the complainants for the cost of their training, and the equivalent of wages for four days, at their starting pay rate, for the time spent in training.

We also emphasize that none of the Secretary's otherwise extensive training regulations at 30 C.F.R. Part 48 addresses the situation encountered in this case. Our decision therefore is based on the statute; there simply is no relevant training regulation bearing directly on the issue.

We now turn to the remedial aspects of the judge's decision. The judge awarded each miner the amount of tuition paid for the training course which that person attended and four day's wages at the starting wage rate. He also awarded some miners the expenses incurred in attending the courses, including an allowance for mileage for six miners, the cost of meals and a motel for two miners, and the cost of meals alone for one miner. Emery does not challenge the amount of tuition or back pay awarded, but rather argues in its petition for review and accompanying briefs that the judge erred in calculating the amount of other expenses to be

reimbursed to the complainants. Emery urges that, under section 115(b), the miners are entitled only to those expenses "above and beyond that which an individual would have incurred had he taken the training at the mine." Emery br. at 13.

At the hearing, counsel for the Secretary introduced evidence on the distance each miner traveled, the tuition fee paid, and incidental expenses. This was received into the record without objection and was before the judge when he made his findings. The issue now raised was not first presented to the judge below. The question of appropriate remedy, therefore, is not properly before us in this case. See section 113(d)(2)(A)(iii) of the Mine Act. Accordingly, we do not disturb the judge's award of damages, and leave for another day discussion of the correct measure of relief for similar violations of section 105(c) and/or 115 of the Mine Act.

On the bases explained above, we affirm the decision of the administrative law judge.

Rosemary M. Collyer, Chairman

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1730 K STREET NW, 6TH FLOOR
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August 10, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 80-413-R LAKE 81-59
MONTEREY COAL COMPANY	:	

ORDER

Upon consideration of the petition for reconsideration of the Commission's June 13, 1983, decision in this matter, and the opposition thereto, the petition is denied. The request for reconsideration identifies no material factual or legal issue that was not fully considered, addressed, and resolved by the Commission. Therefore, further consideration by us is not warranted.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 11, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket Nos. WEST 81-400-R WEST 82-48
EMERY MINING CORPORATION	:	WEST 82-80

DECISION

This consolidated proceeding under the 1977 Mine Act, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981), involves the interpretation and application of 30 C.F.R. § 48.8(a). The cited mandatory standard provides that:

> Each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section.

The administrative law judge concluded that the regulation requires that refresher training be given once every calendar year, and dismissed the proceeding because the calendar year in question had not ended when the Secretary of Labor issued the withdrawal order that initiated the case. 4 FMSHRC 1450 (July 1982)(ALJ). For the reasons set forth below, we reverse and hold that the key language, "annual refresher training," means that refresher training is to occur within twelve months of the last received training.

The essential facts are not in dispute. On September 9, 1981, a Mine Safety and Health Administration ("MSHA") inspector issued Emery Mining Corporation a withdrawal order under section 104(g)(1) of the Mine Act. 1/ The order stated that five of Emery's miners at one of its underground mines had not received the minimum 8 hours of annual refresher training. The five miners had all received refresher training in June 1980. Thus, at the time of the withdrawal order, fifteen months had elapsed since their last training.

1/ Section 104(g)(1)(30 U.S.C. § 814(g)(1)) directs the Secretary to issue a withdrawal order withdrawing miners from a mine if the Secretary finds that the miners have not received their requisite training under section 115 of the Act (30 U.S.C. § 825).

The administrative law judge concluded that compliance with section 48.8(a) is achieved if retraining occurs by December 31 of the calendar year following the calendar year in which the last training had been given. The judge acknowledged that Congress may have intended that refresher training be given within twelve months of the previous training. However, he determined that section 48.8(a) controlled and that the regulation mandates only calendar-year training. In reaching this conclusion, the judge relied upon language in some of the Secretary's other regulations dealing with the training of miners as well as on Emery's training plan approved by MSHA. He specifically found that Emery had notified MSHA that training would be given "By December 31st Annually" on the MSHA form asking "PREDICTED TIME WHEN REGULARLY SCHEDULED REFRESHER TRAINING WILL BE GIVEN." Since this response was approved by MSHA, the judge concluded that only calendar year retraining was mandated. He then applied these findings and conclusions to the sequence of training dates for the five miners involved and held that Emery had not violated section 48.8(a) as to any of the miners. We disagree.

The regulation must be interpreted in light of the statutory provisions that it implements. Section 115(a)(3) of the Mine Act states in relevant part:

> Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that--
>
> ...
>
> (3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that miners already employed on the effective date of the Federal Mine Safety and Health Amendments Act of 1977 shall receive this refresher training no more than 90 days after the date of approval of the training plan required by this section....

30 U.S.C. § 825(a)(3)(emphasis added.) We first construe the meaning of the statutory words, "no less frequently than once each 12 months."

The overall scheme of section 115 is one of sequential, periodic training. A new miner receives 40 hours of training if he is to work underground, or 24 hours if he is to work on the surface. Sections 115(a)(1) & (2). 2/ All miners thereafter must receive at least 8 hours of refresher training, in accordance with the requirement stated in section 115(a)(3), supra. To determine the timing for refresher training "no less frequently than once each twelve months," an operator necessarily must determine when the previous training session occurred. Thus, the scheduling of refresher training is dependent upon a specific event or date -- that is, a miner receives refresher training "no less frequently than once each twelve months" from the completion of the previous training session. This interpretation of the statutory words accords with well established principles of construction that periods of time associated with an event or contingency ordinarily imply an anniversary connotation. See, for example, Matter of PRS Products, Inc., 574 F.2d 414, 419 (8th Cir. 1978). More important, a twelve-month interval between training sessions far better accomplishes the safety objectives of section 115 and the Mine Act as a whole than a calendar-year approach, which could permit almost twenty-four month intervals between training.

Because the regulation in issue was promulgated to effectuate the statute, we therefore apply to the regulation the same anniversary interpretation given its statutory counterpart. The operator contends that the Secretary's choice of "annual" as a "catchword for the corresponding statutory phrase" (Sec'y Br. at 6) renders the regulation unclear on its face. Although "annual" could refer to twelve-month

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2/ Sections 115(a)(1) & (2) provide:

> ... Each training program approved by the Secretary shall provide as a minimum that--
>
> (1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;
>
> (2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate, hazard recognition, emergency procedure electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned....

30 U.S.C. §§ 825(a)(1) & (2).

intervals, it might also be construed to connote a calendar year beginning January 1 and ending December 31. However, when "annual" is read, as it must be, in conjunction with the clear statutory mandate for refresher training at twelve-month intervals, any possible facial ambiguity is dissipated. We therefore hold that 30 C.F.R. § 48.8(a), implementing section 115 of the Act, requires refresher training to be given within twelve months of the last received training. In view of our decision, the Secretary may wish to consider clarifying the regulation through amendment.

We also reject Emery's argument that MSHA's approval of its training plan constituted a "contemporaneous construction" of the regulation in favor of a calendar year interpretation. The judge found that MSHA's approval of Emery's insertion of the words, "By December 31st Annually", in provision number 6 of the plan was tantamount to approval of refresher training on a calendar-year basis. Substantial evidence does not support the conclusion that MSHA knowingly agreed to a retraining plan on a calendar-year basis. Emery and MSHA officials appear to have read provision number 6 to mean the date when Emery would notify MSHA of the specific dates that its miners would undergo refresher training, rather than a date specifying when each miner's refresher training was to occur. 3/ One Emery witness testified that an MSHA representative at a joint meeting of MSHA and Emery officials envisioned that there would be a number of notifications coming out throughout the year as refresher training for miners arose. Tr. 76-77. Moreover, the simple act of

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3/ For example, Emery's assistant training director testified:

> Q. [B]ut putting one date in there that just happened to be the last date of the year did not resolve that, did it?
>
> A. Resolve what?
>
> Q. The agency's problem. That plan does not put them on notice when a refresher training is going to take place, does it?
>
> A. No, it does not. Not the December 31st date.
>
> * * * *
>
> Q. [A]nd the fact that the agency was concerned about when they would be notified of a refresher training does not even touch on the subject of the period in between the refresher training does it?
>
> A. No, it doesn't.

Tr. 63, 64.

approving one operator's training plan would not constitute a dispositive or consistently-applied national pronouncement by the administrative agency that would amount to a "contemporaneous construction" of the regulation. See Florence Mining Co., 5 FMSHRC 189, 196 (February 1983), petition for review filed, 3rd Cir., March 15, 1983; King Knob Coal Co., 3 FMSHRC 1417, 1420-21 (June 1981).

Emery's "contemporaneous construction" claim could also be read as an estoppel defense, in that MSHA's approval of Emery's training plan, assuming it provided for calendar year retraining, estopped the Secretary from enforcing section 48.8(a) against Emery. We adhere to our position in King Knob Coal Company, supra, that under Federal Crop Insurance Corp. v. Merrill, 332 U.S. 381 (1947), estoppel does not run against the federal government. 3 FMSHRC at 1421-22. We note, however, that some confusion did surround MSHA's approval of Emery's training plan, and the government appears partly responsible for the situation. In King Knob, we held that confusing governmental enforcement mitigated the degree of an operator's negligence in the assessment of civil penalty. 3 FMSHRC at 1422-23. On remand, the judge can apply this mitigating principle in assessing Emery's negligence.

For the foregoing reasons, we reverse the judge's decision. The stipulated facts show a violation of section 48.8(a) as to the five miners in question. We remand for a determination of penalty in light of our decision in King Knob.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 12, 1983

LOCAL UNION 1889, DISTRICT 17, UNITED MINE WORKERS OF AMERICA	:	
v.	:	Docket No. WEVA 81-256-C
WESTMORELAND COAL COMPANY	:	

DECISION

This is a compensation proceeding arising under section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). The United Mine Workers of America ("Union") sought, in part, one week's compensation based on an imminent danger withdrawal order issued under section 107(a) of the Mine Act to Westmoreland Coal Company following an explosion at one of the company's mines. The Union requested in the alternative that if the judge were not prepared to resolve that claim, he reserve a final decision until the Department of Labor's Mine Safety and Health Administration ("MSHA") completed its investigation of the cause of the explosion. The Union believed that MSHA would then terminate the order either with or without modifying it to allege a violation of a mandatory health or safety standard. 1/

The judge denied the Union's claim for a week's compensation because the language of the order, as it currently stands, does not contain an allegation that the operator failed to comply with any mandatory health or safety standard. He also declined to retain jurisdiction and dismissed the claim without prejudice. The Union's petition for discretionary review raises the issue of whether the judge should have retained jurisdiction over the proceeding. For the reasons that follow, we vacate the judge's order dismissing the claim for one week's compensation without prejudice and remand for further proceedings. 2/

The facts were stipulated by the parties. 3/ In the early morning hours of November 7, 1980, an explosion occurred inside Westmoreland's

1/ Section 111 provides for miners' compensation for up to one week only if the miners are idled by a section 104 or section 107 order issued "for a failure of the operator to comply with any mandatory health or safety standards." See full text of section 111, note 7, infra.

2/ The Secretary of Labor was not a party below but has filed an amicus brief before the Commission.

3/ The parties filed a set of joint stipulations on February 5, 1982, which are incorporated in the judge's decision at 4 FMSHRC 773, 774-75 (April 1982)(ALJ).

Ferrell No. 17 mine, an underground coal mine located in West Virginia. When management became aware that an explosion occurred, it withdrew the miners working on the 12:01 a.m. to 8:00 a.m. shift from the mine. At 7:30 a.m. an MSHA inspector issued withdrawal order No. 0668337 pursuant to section 103(j) of the Mine Act. 4/ The order applied to all areas of the mine, and provided in part:

> An ignition has occurred in 2 South off 1 East. This was established by a power failure at 3:30 a.m. and while searching for the cause of the power failure, smoke was encountered in the 2-South section. Five employees in the mine could not be accounted for. [The area or equipment involved is] the entire mine....

At 8:00 a.m. on November 7th, one half hour after the 103(j) order had been issued, an MSHA inspector issued Order No. 0668338 pursuant to section 107(a) of the Mine Act. 5/ This imminent danger withdrawal order, which also applied to all areas of the mine, did not allege a violation of any mandatory health or safety standard. The order stated:

> All evidence indicates that an ignition of unknown sources has occurred and five employees cannot be accounted for.

4/ Section 103(j) provides:

> In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j).

5/ Section 107(a) provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

30 U.S.C. § 817(a).

The bodies of all five miners were recovered on November 8, 1980. Subsequently, the 2-South area of the mine was sealed off. On December 10, 1980, both orders were modified to show that the area of the mine affected by the orders was limited to the seals and the area inby the seals. Neither of the orders has been terminated so that they both remain in effect.

The miners who were withdrawn from the mine during the 12:01 a.m. to 8:00 a.m. shift on November 7, were paid for their entire shift. Seventy-six miners were expected to work the November 7 day shift (8:00 a.m. to 4:00 p.m.) at the mine. Eight of these miners reported for work, remained at the mine, worked for eight hours, and were fully paid for that work. At least some of the remaining sixty-eight miners, however, were prevented from entering the mine property by state police, who had erected a road-block at the entrance to Westmoreland's property. Westmoreland later paid all sixty-eight miners four hours of compensation. 6/

On February 5, 1981, the Union filed its original complaint for compensation under section 111 of the Mine Act. 7/ The complaint alleged that "the imminent danger that existed on November 7, 1980, and which led to the issuance of Order Nos. [0668337] and [0668338] was caused by the operator's failure to comply with mandatory safety and health standards." Complaint at 4. Thus, under the third sentence of section 111, the Union claimed that each miner was entitled to up to one week's compensation based on the imminent danger order. The Union subsequently filed an amended complaint on November 9, 1981, seeking limited compensation for both the 103(j) and 107(a) orders under the first two sentences of section 111. The Union also repeated its original claim for a week's compensation under the third sentence of section 111.

6/ Westmoreland broadly characterized the payment of 4 hours to the day shift as "compensation." It argued that the payment of 4 hours compensation fulfilled both the "reporting pay" obligations under its collective bargaining agreement with the Union and section 111 of the Mine Act. The judge found the miners were entitled to four hours reporting pay under the contract and four hours under section 111. 4 FMSHRC 776-79. This issue is not raised on review.

7/ The first three sentences of section 111 provide:

> [1] If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed

(Footnote continued)

Thereafter on February 19, 1982 the Union filed a motion for partial summary decision. In discussing its claim for a week's compensation, the Union acknowledged that the judge may feel "unable to grant this part of the UMWA's motion on the basis of the current record." Motion at 11. If this occurred, the Union requested the judge to reserve final decision until MSHA completes its investigation. Id. At that time the order would presumably be terminated either with or without modifying the order to allege a violation of a mandatory health or safety standard. 8/ Westmoreland answered by filing a cross-motion for summary decision.

The judge issued a summary decision on April 28, 1982. He granted the Union's request for four hours of compensation for the day shift based on the section 103(j) order and the second sentence of section 111. The judge denied the Union's concurrent claims for limited compensation under the first two sentences of section 111 based on the section 107(a) order.

Regarding the Union's claim for one week's compensation under the third sentence of section 111, the judge concluded, "Inasmuch as imminent danger Order No. 668338, here involved, does not cite Westmoreland for failure to comply with any mandatory health or safety standard ... the obvious conclusion is that the miners cannot claim compensation for 1 week of pay under section 111 of the Act." 4 FMSHRC at 785 (emphasis in original). The Union had also sought permission to introduce evidence at a hearing to show that the ignition was the result of Westmoreland's failure to comply with one or more mandatory health or safety standards. The judge refused to permit the Union to present such evidence. He believed it would result in the Union's usurping the Secretary's prosecutorial role. 4 FMSHRC at 785-86.

Finally, the judge declined to reserve ruling on the Union's request for one week's compensation based on legal and practical reasons. First, the judge referred to the fact that he was reversed by the Commission in Council of Southern Mountains v. Martin County Coal Corp., 2 FMSHRC 3216 (November 1980), for issuing a decision that failed to dispose of all

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Fn. 7/ continued

> by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.... 30 U.S.C. § 821.

8/ As noted earlier, the 2-South section of the mine was sealed after the explosion. MSHA will not complete its investigation until the section is reopened. Westmoreland expected to unseal the area in approximately July, 1983. 4 FMSHRC at 785. The Union believes that once MSHA completes its investigation the Union will be able to establish that the 107(a) order was issued for Westmoreland's failure to comply with a mandatory health or safety standard.

pending issues. He also relied on section 113(d)(2)(C), which requires that when a decision is ready for issuance, the judge must forward the record to the Commission. Then, if a petition for discretionary review is filed, the Commission has the complete record. The judge's last reason for denying the Union's request was that:

> [T]here is nothing to prevent UMWA from filing a complaint for a week of compensation under the third sentence of section 111 if and when MSHA does modify outstanding imminent danger Order No. 668338 to allege one or more violations of the mandatory health or safety standards by Westmoreland.

4 FMSHRC at 789. Accordingly, the judge denied the Union's request for deferral of his decision and dismissed the claim without prejudice.

We hold that the judge erred in not retaining jurisdiction over the one week's compensation claim. First, Council of Southern Mountains does not require dismissal of the Union's claim; that case is distinguishable from the facts presented here. It involved a single claim of discrimination under section 105(c) of the Mine Act. The judge issued a decision finding that the operator had discriminated against the Council and ordered the operator to reimburse the Council for expenses and attorneys' fees pursuant to section 105(c)(3) of the Act. The judge's decision did not specify the amount of this award. We held that section 113(d)(1) of the Act and Commission Rule 65(a), 29 C.F.R. § 2700.65(a), require that the judge's decision finally dispose of the proceedings. The judge could have obtained an accounting of the expenses and attorneys' fees tied to the discrimination claim and specified the amount in his decision. Because the judge failed to resolve the amount of fees and expenses in that case, his decision did not finally dispose of the one claim.

In contrast, here the Union has made three separate claims for compensation. The judge finally disposed of all issues relating to the first two claims. At the time of his decision, however, MSHA had not completed its investigation of the cause of the mine explosion and, accordingly, the judge was not prepared to issue a decision on the merits of the claim for a week's compensation. Council of Southern Mountains does not mandate that a judge resolve all claims when he is not ready to do so. It is limited to cases where the judge could resolve all claims but fails to do so.

Second, dismissal without prejudice could cause possible time limitation problems under Commission Rule 35, 29 C.F.R. § 2700.35. That rule provides:

> A complaint for compensation under section 111 of the Act, 30 U.S.C. § 821, shall be filed within 90 days after the commencement of the period the complainants are idled or would have been idled as a result of the order which gives rise to the claim.

The Union timely filed its claim for a week's compensation within 90 days from the time the miners were idled by the orders. Had the Union later refiled its claim following the judge's dismissal, the operator could have opposed the complaint on the ground that it was not timely filed. We need not resolve in this case whether Rule 35 would have barred later refiling. We hold, however, that retention of the Union's claim was the preferable procedural course because it prevented, rather than created, possible time limitation problems. 9/

We also emphasize that compliance with Rule 35 enhances judicial administration of compensation claims. Records needed to identify the complainants as well as their rates of pay are easily accessible within 90 days of idlement. In the event a mine is closed for some length of time, as here, it is preferable to have a claim remain on a judge's docket than to have the parties establish or defend a claim several months or years later. In short, retention of the Union's compensation claim during the pendency of the MSHA investigation would have provided the miners with more certain protection of their interests under section 111 than dismissal without prejudice. Cf. Eastern Assoc. Coal Corp., 2 FMSHRC 2774, 2775-78 (October 1980)(stay of a notice of contest preferable to dismissal without prejudice.)

In addition, there is procedural authority for separate adjudication of multiple claims. The Commission's rules do not expressly address the issuance of decisions in cases involving multiple claims. 10/ Therefore, we apply Commission Rule 1(b), 29 C.F.R. § 2700.1(b), which states:

> Applicability of other rules. On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. §§ 554 and 556), the Commission or any judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

Under Rule 1(b), it is thus appropriate to turn for guidance to the Federal Rules, which provide for separate adjudication of multiple claims.

Rule 54(b), Fed. R. Civ. P. permits adjudication of fewer than all claims presented in an action. 11/ Had the judge applied Rule 54(b), he

9/ Cases may arise in the future involving the issue of whether, under certain circumstances, the 90-day time limitation in Rule 35 may be waived. We intimate no view at this time as to the resolution of such questions.

10/ Commission Rule 65, which deals with judge's decisions, is silent on the issuance of decisions involving multiple claims.

11/ Rule 54(b) provides:

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether

(Footnote continued)

could have resolved the Union's first two claims while retaining jurisdiction of the third claim. See Curtis-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980), and Sears Roebuck and Co. v. Mackay, 351 U.S. 427 (1956). The judge was prepared to issue a decision resolving the first two claims, and there was "no just reason to delay" that decision. Under the Rule, his adjudication of the first two claims would have been a final decision, subject to the review procedures of the Mine Act. Utilizing Rule 54(b) would also have been in harmony with Commission Rule 64(a), 29 C.F.R. § 2700.64(a), which provides:

> At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the judge to render summary decision disposing of all or part of the proceeding.

29 C.F.R. § 2700.64(a)(emphasis added). Indeed, the Union had filed a motion under Commission Rule 64(a) for "partial" summary decision seeking resolution of its first two claims.

In general, the question of separate adjudication of claims belongs within the informed discretion of the judge. He is in the best position to evaluate the various procedural alternatives available "to secure the just, speedy and inexpensive determination of all proceedings." Commission Rule 1(c), 29 C.F.R. § 2700.1(c). In this instance, however, the judge apparently did not consider applying Federal Rule 54(b), nor was such a course suggested by either party below. We find that in this particular factual situation of a pending MSHA investigation, the judge should have applied Federal Rule 54(b) "so far as practicable" and "appropriate," and separately adjudicated the claims. This action would have secured the "just, speedy and inexpensive determination" of all the proceedings. The claims for limited compensation, which were ripe for decision, could have been adjudicated. This would be in harmony with Congressional intent for expedited compensation proceedings. And, as we have indicated above, retention of the remaining claim would have avoided time limitation problems and better protected the miners' interests.

There is also an important practical aspect to our decision to remand. The status of the case has changed. The Union repeatedly advised the judge that MSHA would be taking enforcement action against Westmoreland. On July 15, 1982, MSHA issued thirteen section 104(d)(2) orders to Westmoreland. The

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Fn. 11/ continued

> as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

orders are based on statements taken during MSHA's investigation into the ignition. Westmoreland filed notices of contest of all thirteen orders and MSHA has initiated civil penalty proceedings. 12/ These cases are currently pending before the same judge who adjudicated these compensation claims. The question of whether the order litigated here was issued "for a failure of the operator to comply with any mandatory" standard may be resolved in the context of the notices of contest and penalty proceedings currently pending before the judge. In the alternative, because Westmoreland apparently plans to unseal the 2-South section during the summer of 1983, it may be feasible to proceed after MSHA completes its investigation.

We express no view about whether these thirteen 104(d)(2) orders or any later modification of the 107(a) Order No. 668338, may provide the basis for a week's compensation under the third sentence of section 111. We also do not reach the legal arguments raised by Westmoreland concerning whether the imminent danger order as issued must contain an allegation of a violation for purposes of section 111 compensation. All of these questions on the merits of the Union's claim are appropriate for resolution in the first instance by the judge.

We commend the judge's conscientious efforts to resolve this complicated litigation but, for the reasons discussed above, vacate his order dismissing without prejudice the Union's claim for a week's compensation. The case is remanded to the judge with instructions to hold the record open as to the Union's claim for a week's compensation. The parties are free to submit any appropriate motions or showings. If the Union fails to make appropriate showings upon the completion of MSHA's investigation, Westmoreland may file an application for a show cause order to determine if the claim should be dismissed. The judge's resolutions of the Union's other claims are final, since no review was taken as to those aspects of his decision.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

12/ The notices of contest are contained in docket numbers WEVA 82-340-R through WEVA 82-352-R. The judge has consolidated these cases with the related civil penalty cases, docket numbers WEVA 83-73 and WEVA 83-143.

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 2, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 82-133 A.C. No. 36-00807-03110
v.	:	
	:	Renton Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

This is a petition for the assessment of a civil penalty for a violation of 30 C.F.R. § 75.1702.

The parties have filed motions for summary decision together with supporting affidavits and briefs. Since there is no genuine issue of material fact and judgment can be rendered as a matter of law, summary decision is appropriate. 29 C.F.R. § 2700.64(b).

30 C.F.R. §§ 75.1702 and 75.1702-1 provide as follows:

§ 75.1702 Smoking; prohibition.

> No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.

§ 75.1702-1 Smoking programs.

> Programs required under § 75.1702 shall be submitted to the Coal Mine Safety District Manager for approval on or before May 30, 1970.

Citation No. 1143766, dated January 5, 1982, cites a violation of § 75.1702 as follows:

> The mines [sic] program for the searching of smoking articles was not being followed in that the week of December 21 to 25 the "A" and "C" crews were not reportedly examined, and the week of December 27 to January 1 the "C" crew was not reportedly examined. All crews are to be systematically searched weekly.

In his sworn affidavit the operator's superintendent admits that the facts described in the "Condition or Practice" are true. He further advises that the operator's program for searching miners for smoking materials involves one search per week for each crew.

The parties agree that the issue presented for resolution is whether this violation is significant and substantial.

In National Gypsum Company, 3 FMSHRC 822 (1981), the Commission considered at length what would constitute a violation which "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." The Commission held that a violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there existed a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature. 3 FMSHRC at 825. In addition, the Commission expressed its understanding that the word "hazard" denoted a measure of danger to safety or health, and that a violation significantly and substantially contributed to the cause and effect of a hazard if the violation could be a major cause of danger to safety or health. 3 FMSHRC at 827.

The operator's position that the violation is not significant and substantial relies upon the facts that during the two week period involved work was not performed every day and that on the shifts in question all of the miners did not work. The superintendent's affidavit states in part:

4. For the period December 21 through December 25, the Renton Mine worked a total of three days, during which period the "A" and "C" crews were not searched for smoking materials. During that period, of the normally scheduled workforce on the "A" crew approximately twenty-five percent of the miners did not work. During that period, of the normally scheduled workforce on the "C" crew approximately one-third of the miners did not work;

5. For the period December 27 through January 1, the Renton Mine worked a total of five days, during which period the "C" crew was not searched for smoking materials. During that period, of the normally scheduled workforce on the "C" crew approximately twenty-eight percent of the miners did not work[.]

The superintendent's affidavit further reports that searches for smoking materials involve a pat-down of the miner and an inquiry to him whether or not he has such materials in his lunch pail.

After careful consideration I do not find the circumstances as described by the superintendent and as interpreted by operator's counsel persuasive on the issue of "significant and substantial." Moreover the factors relied upon by the operator are greatly outweighed by the fact this mine is extremely gassy. The affidavit of the MSHA sub-district office manager recites in part that:

4. Renton Mine is a particularly gassy mine that, due to its liberation of high quantities of methane, is subject to statutorily-mandated spot inspections under § 103(i) of the Act. Specifically, between the inception of the 1977 Mine Safety and Health Act and July 1, 1982, Renton Mine liberated between 500,000 and 999,999 cubic feet of methane every 24 hours. As such, it was subject to spot inspections under § 103(i) every ten working days at irregular intervals. Beginning July 1, 1982, Renton Mine was determined to be liberating quantities of methane

in excess of 1 million cubic feet per 24 hours and is accordingly now subject to spot inspections every five working days under § 103(i).

It is clear from the affidavit that in this mine a methane liberation can occur at any time and at any place. Under such circumstances, the fact that the work crews which were not examined were two-thirds or three-fourths of their total personnel strength does not render the violation insignificant and insubstantial. Nor does the fact that full weeks were not worked or that only a limited period of time was involved make any difference. In a mine like this every moment is fraught with peril from a methane explosion. As some of the exhibits submitted by the Solicitor demonstrate, smoking and smoking materials underground may cause or contribute to a mine explosion. Where so much methane can be liberated at any time the great danger created or contributed to by this violation, is ever-present. Under such circumstances there exists the reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature.

The operator argues that the violation is not significant and substantial because the search is a mere pat-down and an inquiry to the miner regarding his lunch pail whereas a daily strip search would be necessary to eliminate the possibility of miners taking smoking materials into the mine. The operator's approach appears based upon the faulty premise that because the operator cannot do everything, it really is not important for it to do anything. Such a rationale would all but nullify the mandatory standard and its underlying purpose. I am persuaded by the Solicitor that searches such as should have been performed here have a deterrent effect. I agree with her assertion that without the required inspections, miners may either inadvertently or purposefully carry smoking materials underground. The operator inconsistently points to the deterrent effect its own work rules and Pennsylvania law would have upon a miner who is found taking smoking materials underground but apparently would accord no such effect to Federal law.

The operator argues that the circumstances peculiar to this mine should be determinative, not what has happened at other mines. I agree. That is why I decide this case on the basis of the factor peculiar to this mine which

eclipses all other considerations, i.e., its extremely gassy nature. The fact that this mine liberates so much methane renders continuously crucial the deterrent effect of the search for smoking materials.

In light of the foregoing, I conclude that the violation was significant and substantial.

Finally, the operator alleges that the proposed penalty of $210 is excessive. Whether a cited violation is significant and substantial is irrelevant to the determination of the appropriate penalty amount to be assessed. Penalty proceedings before the Commission are de novo and the amount of the penalty to be assessed is based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. As already pointed out, the violation was serious. I find the operator was guilty of ordinary negligence. The mine is large, assessment of the penalty will not affect the operator's ability to continue in business and there was good faith abatement. Based on the record there is no history of prior violations of this standard. After consideration of all the statutory factors, I conclude the proposed penalty is appropriate.

It is ORDERED that the operator pay $210 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 8, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 83-57-M A.C. No. 20-00801-05501
v.	:	
	:	Nugent Sand Mine
NUGENT SAND COMPANY, INC., Respondent	:	

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the six 1/ violations involved in this matter. The proposed settlements are for the originally assessed amounts. Three violations were assessed at $20 apiece and the others were assessed at $91, $126 and $136, respectively. The operator has already tendered payment of $413.

One citation was issued for failure to properly maintain a guard at the head pulley. The violation was serious and negligence was low. This violation was originally assessed for $91. A second citation was issued because a grinding machine did not have an adjustable tool rest. The violation was serious and negligence was moderate. This violation was originally assessed for $126. A third citation was issued because miners were working on the drive gear of a dryer machine without the power control box being locked out. The violation was serious and negligence was moderate. This violation was originally assessed for $136. The Solicitor proposes to settle these citations for the originally assessed amounts. On the basis of the foregoing, I conclude these settlement amounts are appropriate.

1/ The Solicitor's motion mistakenly states that there are eight citations. The record, including the assessment sheet shows that only six citations are involved.

There is insufficient information, however, regarding the three $20 violations. In my opinion, $20 denotes a lack of gravity. However, the $20 violations are for lack of a fire extinguisher on a front-end loader, lack of a guard on a take-up pulley and lack of a guard on a head pulley. I do not know whether these conditions are serious or not but I could not find a lack of gravity on the face of the subject violations.

It appears from the assessment sheet that the three violations which are assessed at $20 each were done so as the result of the so-called "single penalty assessment" set forth in section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. § 100.4. This regulation provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in this proceeding. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfull and discharge. This can only be done on the basis of an adequate record.

I will not order that this case be dismissed with respect to the $91, $126 and $136 proposed settlements pending final disposition of the three $20 proposed settlements.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the three proposed $20 penalties are justified and if not, what settlement amounts the parties believe are warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

AUG 9 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 81-383 A.C. No. 05-03648-03001
v.	:	Big 3 Mine
RICHARD KLIPPSTEIN and W. O. PICKETT, JR., Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Richard Klippstein, Rifle, Colorado Pro Se.

Before: Judge Carlson

This civil penalty proceeding arises out of respondents' alleged operation of a coal mine near Rifle, Colorado. The matter is before me under the provisions of the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The five alleged violations for which the Secretary now seeks civil penalties were cited in a federal mine inspector's imminent danger withdrawal order under section 107(a) of the Act. Although given notice, respondents failed to appear at the hearing scheduled for 8:30 a.m. on October 8, 1982. I personally contacted respondent Klippstein to remind him of the time and date. He then appeared, and the hearing began two and one half hours late.

Petitioner filed a post-trial brief, to which respondent Klippstein replied.

Issues

1) Was W.O. Pickett, Jr. properly named as co-respondent in this proceeding?

2) Was a MSHA inspector's entry and inspection of the Big 3 Mine proper?

3) Were exploration activities at the Big 3 Mine sufficient to mandate compliance with the Act and its safety regulations, and if so, did the alleged violations occur and were the assessed penalties appropriate?

SUMMARY AND DISCUSSION OF THE EVIDENCE

General Background

The undisputed evidence shows that the Big 3 coal mine was first worked in the 1920's, and was operated a second time during the 1940's. The mine consisted of a single drift some 1300 feet in length, contained several coal seams, and ended at a 40 foot seam of unmined coal.

The evidence shows that in 1980 Klippstein purchased the land upon which the mine was located. His intent, he testified, was to build and sell houses on the new property, which was adjacent to the rural acreage upon which his own home was located. The building project appeared promising at the time because of the proximity of the mine to a large public reservoir. Statements by Klippstein in his written pleadings and at the hearing showed that he re-opened the mine drift for a dual purpose: to develop a water right to spring water in the mine and to assess the coal deposits. A confirmed water source was necessary to provide water to the proposed housing project. In re-opening the drift, respondent, with the occasional help of his two sons, did drilling and blasting, and used a front-end loader to remove debris.

In January 1981, MSHA inspector Villegos and a supervisor learned of apparent mining-related activities on Klippstein's property, and entered the land to further investigate. Once there, they observed an independent contractor and two crew members using a front-end loader and dump trucks to remove piles of mine tailings. The inspector was told that two men had been seen on another day going up to the mine to remove coal.

When Villegos approached the mine portal, he observed a front-end loader near the mine. The machine was covered with coal dust and its tracks led into the mine. Since no mine representative could be found, Villegos entered the mine without one. Inside, he testified, he discovered signs of recent activity; electrical wiring for lighting, blasting caps, and signs of drilling were noted. In addition, two piles of coal (each about 250 to 300 pounds) lay beneath a coal seam.

After testing air movement in the drift, Villegos issued a withdrawal order based upon violation of five mandatory standards. The order specified

that it was issued pursuant to sections 107(a) and 104(a) of the Act. 1/ The order was issued to both Richard Klippstein and W.O. Pickett, Jr., believed by the inspector to be co-owners and operators of the mine.

Klippstein succeeded in acquiring a conditional water right to the mine's spring water by decree of a Colorado Water Judge on June 18, 1982 (exhibit R-1). He had closed the mine around October, 1981.

Status of Co-respondent Pickett

Undisputed testimony at the hearing indicated that respondent Pickett had no financial interest in the mine, nor any surface or mineral rights to the property. I therefore conclude that Pickett should not have been named as co-respondent, and should suffer no liability for the charges involved in this proceeding. All further discussion in this case will concern respondent Klippstein. The proceeding will be dismissed as to Pickett.

Unauthorized Entry and Inspection of Mine

Respondent denies operating a mine, and maintains that while an access road was open on the day of the inspection, his property was well posted against trespassing. He therefore contends that Inspector Villegos' unauthorized entry onto his property, and inspection of the Big 3 mine, were improper.

1/ Section 107(a) provides:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 104(a) provides in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation.

In contrast, petitioner contends that the entry and inspection were proper. There was no expectation of privacy, no guard at the mine, nor any mine representative present (Tr. 88).

I accept petitioner's arguments and find Villegos' entry onto Klippstein's property and the mine inspection to be reasonable under the circumstances. Section 103(a) of the Act provides MSHA inspectors with the right of entry to, upon, or through any mine. No advance notice of an inspection need be given. Furthermore, the Supreme Court has ruled that warrantless inspections authorized under section 103(a) do not violate the Fourth Amendment; the certainty and regularity of the Act's inspection program provide a constitutionally adequate substitute for a warrant. Donovan v. Dewey, 452 U.S. 594, 101 S. Ct. 2534 (1981).

The propriety of inspections turns, then, on a MSHA inspector's reasonable belief in the existence of a mine and associated mining activities. Inspector Villegos had such a belief when he entered respondent's property and inspected the mine. Removal of mine tailings provided a prima facie indication of mining operations. Furthermore, Villegos was informed (whether correctly or not) that coal was being removed from the mine. The condition of the mine itself gave additional indication of present mining activity: the portal was open, signs of drilling and blasting were evident, and a front-end loader was parked near-by.

Therefore, under the Act's provisions and based upon the evidence, I find the inspection to be proper. I next turn to the issue of MSHA's jurisdiction in the issuance of a withdrawal order, based upon the violation of mandatory standards, and the proposed penalties.

MSHA Jurisdiction

Respondent claims that the Big 3 Mine was not being operated for purposes of mineral extraction at the time of the inspection. He therefore contends that issuance of a withdrawal order and citations was not within MSHA's jurisdiction.

On the other hand, petitioner argues that Klippstein's operation is a mine as defined by the Act, and comes within the Act's coverage by virtue of its affect on commerce. I agree with petitioner, and find that respondent's exploratory activities in the mine were sufficient to invoke MSHA's jurisdiction and mandate compliance with the Act's safety regulations.

Section 3(h)(1) of the Act defines a mine as "underground passageways ... used in, or to be used in, or resulting from the work of extracting [minerals] from their natural deposits." Mines subject to the Act are those whose products enter commerce, or "the operations or products of which affect

commerce ...." 30 U.S.C. § 803. The legislative history of the Act [2], and court decisions encourage a liberal reading of such provisions in order to achieve the Act's purpose of protecting miners' safety. Westmoreland Coal Co. v. Federal Mine Safety and Health Review Commission, 606 F. 2d 417 (4th Cir. 1979).

Accordingly, the Commission has not limited mining activities covered by the Act to operations involving actual mineral extraction. Instead, attempts to drive a shaft and establish a portal, merely to evaluate a mineral deposit and mining feasibility, have been ruled sufficient activity to involve hazards intended to be regulated by the Act. Cyprus Industrial Minerals Corp., 3 FMSHRC 1 (January 1981), aff'd, 664 F. 2d 1116 (6th Cir. 1981).

I find respondent's activities to involve similar motives of mineral exploration with associated hazards. As admitted in an answer to the Secretary's proposal for penalties, Klippstein re-opened the Big 3 Mine "for two reasons, to secure a water right to the water in the mine and to see if there was any coal in it." Had valuable amounts of coal been discovered, Klippstein testified that he would have sought someone to mine the deposits (Tr. 88). By re-opening the mine to determine the feasibility of mining its coal deposits, Klippstein brought himself within the coverage of the Act. [3]

Respondent cannot avoid MSHA's jurisdiction by claiming to individually perform all work in the mine. The provisions of the Act are applicable even where an owner-operator works a mine. Marshall v. Conway, 491 F. Supp. 1123 (D.C. Pa 1980).

Finally, respondent can not avoid the jurisdiction of the Act by claiming that his activities failed to affect commerce. Unsafe working conditions of one operation, even if in initial and preparatory stages, influence all other operations similarly situated, and consequently affect interstate commerce. Godwin v. Occupational Safety and Health Review Comm., 540 F. 2d 1013 (9th Cir. 1976).

2/ S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

3/ The removal of tailings by an independent contractor was relevant to the issue of the propriety of the inspection. Klippstein testified, in essence, that the contractor approached him and offered a price for the tailings as salvage. There was no evidence linking the tailings salvage to the re-establishment of the drift. Thus, while the tailings activity was among those facts which gave the inspector good cause to suspect that mining was in progress, I must agree with Klippstein that it quite likely may not have constituted mining. The finding on jurisdiction is based on Klippstein's own activities and those of his two sons within the drift.

ing conditions governed by the Act, and therefore affected interstate commerce as it relates to the mining industry. The mere fact that the exploratory activity also included development of a water right does not allow respondent to deny an affect on commerce or escape the Act's regulatory powers as they affect mineral development.

Citations and Proposed Penalties

The citations [4]/ issued for violations of regulations promulgated under the Act, and proposed penalties are as follows:

Citation No.	Violation Charged	Applicable 30 C.F.R. §	Proposed Penalty
1127905 A	No mechanical ventilation	75.300	$ 240
1127905 B	Impermissible power connection units	75.507	$ 56
1127905 C	No notice given of mine reopening	75.1721	$ 24
1127905 D	No books or recording of mine tests	75.1800	$ 24
1127905 E	No notice given of legal identity of operator	41.11(a)	$ 24
		Total	$ 368

The first citation charges respondent with failure to provide mechanical ventilation in the mine. The standard allegedly violated, 30 C.F.R. § 75.300, provides as follows:

> All coal mines shall be ventilated by mechanical ventilation equipment installed and operated in a manner approved by an authorized representative of the Secretary and such equipment shall be examined daily and a record shall be kept of such examination.

4/ The withdrawal order specified that it was issued under both 107(a) and 104(a) (as is the Secretary's common practice where a 107(a) order is based upon alleged violations of mandatory standards). Thus, MSHA denominated the five violations a "citation" for penalty purposes, and divided it into a sub-part for each standard cited. In the interest of consistency the term "citation" shall be used through the remainder of this decision.

Villegos testified that at the time of his inspection, no ventilation machinery was in place at the mine. Mechanical ventilation would have been indicated by the presence of fans on the ground's surface.

A second citation was issued for the use of impermissible electrical wiring in the mine. Respondent allegedly failed to supply a proper ground wire when providing electric lighting inside the tunnel. The standard allegedly violated, 30 C.F.R. § 75.507, provides:

> Except where permissible power connection units are used, all power connection points outby the last open crosscut shall be in intake air.

Due to the presence of some detectable methane as well as some coal dust in the mine, and respondent's failure to provide proper ventilation and electrical wiring, Villegos felt that an imminent danger of explosion existed. He therefore issued a withdrawal order.

Villegos charged three additional violations because of respondent's alleged failure to comply with certain administrative requirements. Under the Act's regulations, an operator must notify the Coal Mine Health and Safety District Manager before opening an inactive coal mine, and must submit preliminary mining plans for approval before commencing with mine development. 30 C.F.R. § 75.1721. The legal identity of the operator must also be filed with MSHA. 30 C.F.R. § 41.11(a). Furthermore, certain tests and examinations must be conducted in underground coal mines, and results are to be recorded in books approved by MSHA. 30 C.F.R. § 75.1800.

Petitioner shows that respondent failed to satisfy these regulatory requirements. No notice of mine reopening was given, the legal identity of the mine operator was not filed, and no records of mandatory mine tests were kept (Tr. 25-27).

Respondent's defense in this case rested solely on the issue of whether the operation was a mine regulated under the Act. During the hearing, Klippstein did not directly dispute the evidence of the violations, or the appropriateness of the penalties.

In his reply to petitioner's post-trial brief, however, respondent suggests that he was misled into thinking that the purpose of the hearing was to decide only if MSHA did have jurisdiction over the matter. He claims to have believed that specific charges would be dealt with after the jurisdictional decision was made.

I find such beliefs to be unfounded. Klippstein was afforded the opportunity to challenge the citations and penalty assessments at two different points during the hearing - after I informed him that it might be wise to do so in the event that I ruled against him on the jurisdictional issue (Tr. 56, 70). Respondent's later dissatisfaction with his failure to dispute such charges therefore has no bearing on the outcome of this case.

Since the uncontroverted evidence shows that respondent conducted his exploratory operations in a manner contrary to the Act's regulations, I find that the violations were properly charged.

Penalties

We now turn to the matter of appropriate penalties. Section 110(i) of the Act sets forth six criteria to be considered in determining a reasonable penalty. It provides:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Respondent's mine had no history of previous violations, and would be considered a small operation. Klippstein testified at the hearing that he was unemployed, and owned only the property involved in this case. These facts suggest imposition of even a modest penalty would have a significant deterrent effect.

Respondent's failure to comply with the Act's regulations was negligent. Under the facts of this case, respondent failed to exercise reasonable care in complying with regulatory requirements in the operation of his mine. Nevertheless, the respondent's inexperience with federal mine safety regulation, and seemingly honest belief that his operations were lawful and did not fall within MSHA jurisdiction are mitigating factors in the finding of negligence.

In determining the gravity of the violations, consideration must include the probability of injury, seriousness of potential injury, and the number of workers exposed to such hazard. Lack of proper mechanical ventilation and the possible presence of methane could have resulted in a serious or fatal injury. However, work in the mine was limited in extent and duration, and typically involved only one worker. Consequently, I consider the gravity to be less than originally determined by the Secretary.

There is no indication that respondent abated the hazardous conditions upon notification of the violations and order of withdrawal. Instead, at a chance meeting several months after the citations and order were issued, respondent informed the inspector that he and his sons were still working the mine (Tr. 21). Such factors weigh against respondent.

On balance, however, I conclude that the $368 total of proposed penalties is excessive. Based upon the criteria for assessing civil penalties as set forth in the Act, and the evidence of record, I conclude that the civil penalties for violations should be reduced and assessed as follows:

Citation No.	Reduced Penalty
1127905 A	$ 70.00
1127905 B	28.00
1127905 C	12.00
1127905 D	12.00
1127905 E	12.00
	$134.00

CONCLUSIONS OF LAW

Based upon the findings made in the narrative portion of this decision the following conclusions of law are entered:

1. W. O. Pickett, Jr. should not have been named co-respondent and shall suffer no liability for the charges involved in this proceeding.

2. The mine and exploratory activities of respondent Klippstein were under the jurisdiction of the Act.

3. Respondent violated the standard published at 30 C.F.R. § 75.300 as charged in citation 1127905 A.

4. Respondent violated the standard published at 30 C.F.R. § 75.507 as charged in citation 1127905 B.

5. Respondent violated the standard published at 30 C.F.R. § 75.1721 as charged in citation 1127905 C.

6. Respondent violated the standard published at 30 C.F.R. § 75.1800 as charged in citation 1127905 D.

7. Respondent violated the standard published at 30 C.F.R. § 41.11(a) as charged in citation 1127905 E.

8. The appropriate civil penalties total $134.00

ORDER

Accordingly, the Secretary's petition proposing penalties, as modified by this decision, is affirmed, and respondent Klippstein is ORDERED to pay the above assessed penalties, totaling $134.00, within 30 days of issuance of this order.

John A. Carlson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

AUG 12 1983

RICHARD D. CLEMENS,	:	DISCRIMINATION PROCEEDING
	:	
Complainant	:	Docket No. WEST 81-298-DM
	:	
v.	:	MSHA Case No. MD 80-176
	:	
ANACONDA MINERALS COMPANY,	:	Carr Fork Mine
Division of ATLANTIC	:	
RICHFIELD COMPANY,	:	
Respondent	:	

DECISION

Appearances: James E. Hawkes, Esq., King and Hawkes
Salt Lake City, Utah,
for Complainant;
Leslie M. Lawson, Esq., Anaconda Minerals Company,
Denver, Colorado,
for Respondent.

Before: Judge Vail

Procedural History

This case is before me upon the complaint of Richard Clemens under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). Clemens alleges that Anaconda Minerals Company (Anaconda) reduced his pay following a job transfer made within the Carr Fork copper mine for health reasons, and that such pay reduction constitutes a discriminatory action prohibited by section 105(c)(1) of the Act.

Anaconda filed a motion for summary decision, claiming no genuine issue of fact and that Clemens' allegations did not constitute a violation of the Act or any federal regulations promulgated thereunder. Clemens responded, and the matter was set for hearing on October 26, 1982 at Salt Lake City, Utah. At the hearing, the parties submitted stipulated facts, and elected to argue all further legal issues in post trial briefs.

Stipulated Facts

In summary, the stipulated facts establish that Clemens was employed by Anaconda on April 17, 1978 as a miner first-class. Clemens had been a miner for over thirty years, including fifteen years working underground. Prior to June 1980, he went to his own private physician due to illness and was told that he suffered from "Restrictive Pulmonary Disease with hypoxemia." Clemens provided Anaconda with the medical diagnosis, and consequently was transferred from underground duties to the job of toplander. The toplander job normally carries a lower pay-grade. Clemens claims that he accepted the

job transfer believing that his pay would not be lowered, while Anaconda claims that Clemens understood that his pay-grade would be changed upon transfer. Clemens' salary was reduced on September 2, 1980 (approximately three months after his transfer).

Issues

1) Did Clemens' reduction in pay following his job transfer constitute a discriminatory act in violation of section 105(c)(1) of the Act?

2) If so, what is the appropriate relief to be awarded Clemens and what are the proper civil penalties to be assessed against Anaconda for such discrimination?

Discussion

Section 105(c)(1) provides in pertinent part as follows:

> No person shall ... in any manner discriminate against ... or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... in any coal or other mine subject to this Act because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to § 101 ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

To establish a prima facie case showing violation of section 105(c)(1), a complainant must introduce evidence of a connection between an adverse action and exercise by a miner of a protected activity. Two protected activities recognized by the Commission are 1) the filing or making of a complaint under or related to the Act; [1]/ and 2) the exercise of any statutory right afforded by the Act. [2]/ Clemens alleges that he exercised both forms of protected activity, and therefore claims that his pay reduction upon job transfer constitutes unlawful discrimination under section 105(c)(1) of the Act.

Protected activity of making a complaint.

Clemens contends that he engaged in a protected activity when he complained to Anaconda's personnel manager of unsafe and hazardous mine conditions. His good faith belief in the existence of such conditions is said to be supported by his doctor's report, urging Clemens' transfer from underground work due to work related respiratory problems. Such factors

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1/ Sec. ex rel. Long v. Island Creek Coal Company, 2 FMSHRC 1529 (June 1980)(ALJ); aff'd., No. 80-1799 (4th Cir. September 14, 1981).

2/ United Mine Workers of America on behalf of Beaver v. North American Coal Corp., 3 FMSHRC 1428 (June 1981)(ALJ).

are claimed to establish existence of a protected activity under the criteria of Sec. ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub. nom., Consolidation Coal Company v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981).

Clemens accuses Anaconda of granting his transfer merely to prevent further complaints. Reduction of his pay upon transfer is therefore claimed to be an unlawful, discriminatory act. The fact that such pay reduction was delayed for three months is said to do nothing to alleviate the discriminatory impact of Anaconda's action. Anaconda, on the other hand, fails to acknowledge Clemens' exercise of such a protected activity and rejects his claim that the delay in reducing his pay upon transfer to a toplander job was an attempt to mask a discriminatory act. Instead, it claims that the delay was due only to an oversight.

Upon review of the stipulated facts, I find Clemens fails to substantiate his claimed exercise of a protected activity under the criteria of Pasula and related cases. In addressing the protected activity of filing or making a complaint, the Commission recognized in Pasula that the scope of protected activities under the Act included a miner's right to refuse to work where the miner had a reasonable good faith belief of a sufficiently severe safety hazard. However, for a miner to claim the protection of section 105 (c)(1), he must, at the time he refuses to work, expressly ground his refusal on an unsafe condition. Sec. ex rel. Duncan v. T. K. Jessup, Inc., 3 FMSHRC 1880 (July 1981)(ALJ); Kaestner v. Colorado Westmoreland Inc., 3 FMSHRC 1994 (August 1981)(ALJ).

Clemens fails to satisfy such conditions as there is no indication in the stipulated facts that he indeed refused to work underground due to his belief that mine conditions presented a safety hazard. Instead, the evidence shows Clemens requested a transfer based upon his physician's advice that it might be wise to do so due to his respiratory problems. Furthermore, Clemens failed to establish that he expressly based his request for transfer on a complaint of unsafe mine conditions. The stipulated facts show no evidence of any such complaint being made, nor existence of any health or safety violations in the mine.

Therefore, I reject Clemens' claim of unlawful discrimination provoked by the protected activity of expressing a mine safety complaint. As such, I find it unnecessary to address the reason for Anaconda's delay in reducing Clemens' pay.

Protected activity of exercising a statutory right.

Clemens further contends that unlawful discrimination occurred following his exercise of a statutory right, where such statutory right constitutes a second form of protected activity under section 105(c)(1) of the Act. Clemens claims that mandatory standard 30 C.F.R. § 57.18-2 affords a basic right of transfer upon discovery of health or safety hazards in non-coal mines. Such a standard, he argues, triggers the language of section

101(a)(7) of the Act, which provides in pertinent part as follows:

> Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer.

Anaconda dismisses Clemens' arguments by pointing to the actual provisions of the Act and its health and safety regulations. Anaconda claims that Clemens' pay reduction would constitute discrimination under section 105(c)(1) only if he had been the subject of medical evaluations and potential transfer or actually transferred under the authority of a standard published pursuant to section 101(a)(7) of the Act. Anaconda contends that provisions of section 101(a)(7), regarding maintenance of pay upon transfer, cannot be read as creating an independent statutory right, but instead are to take effect only upon promulgation of related health and safety regulations. However, such mandatory health and safety regulations have only been promulgated for coal mines, under 30 C.F.R. 90 ("Health Standards for Coal Miners with Evidence of Pneumoconiosis"). Since no similar regulations (allowing transfer for medical reasons with no reduction of pay) have been promulgated for non-coal mines, Anaconda argues that there is no legal requirement to pay Clemens a wage other than that normally paid for the job into which he was transferred. Therefore, Anaconda denies that discrimination under section 105(c)(1) of the Act has occurred.

Upon careful examination of the Act and its regulatory provisions, I concur with Anaconda's arguments and conclude that no statutory right to medical evaluation, and resulting transfer with maintenance of pay, exists for non-coal mines. Section 101 of the Act provides guidelines for the development and promulgation of mandatory health and safety standards. Within that section, the Secretary is given the discretionary power to issue standards providing for the transfer of a miner upon a medical determination that exposure to hazards "covered by such mandatory standards" may result in health impairment. Further, any miner transferred under mandatory standards and as a result of exposure to such hazards shall not suffer a reduction in pay. 30 U.S.C. § 811(a)(7).

Under these provisions, the key to the right of transfer with maintenance of pay is the promulgation of regulations where deemed appropriate by the Secretary. The Secretary has exercised such discretionary rule-making power by affording coal miners having evidence of mine-related lung disease the option of transfer while retaining their regular rate of pay. 30 C.F.R. §§ 90.3, 90.102-103. However, no similar rule pertaining to non-coal mines has been promulgated. Clemens therefore fails in his attempt to establish discrimination based upon his alleged exercise of a second form of protected activity at the Carr Fork copper mine.

Clemens argues that existence of specific regulations (including medical examination procedures, optional transfer and pay-maintenance provisions) is not necessary to guarantee the maintenance of pay as provided in section 101(a)(7) of the Act. Instead, Clemens claims that the provisions of standard 30 C.F.R. § 57.18-2 afford a general right of transfer, thereby triggering pay-maintenance provisions of section 101(a)(7) of the Act.

I find this argument to be based on a misinterpretation of the Act and 30 C.F.R. § 57.18-2. The regulation provides in 57.18-2(a) that each working place shall be examined at least once each shift (by a person designated by the operator) for conditions which may adversely affect safety or health. Furthermore, 57.18-2(c) provides in pertinent part as follows:

> Conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected ....

Such regulatory provision does not afford automatic rights of transfer upon a finding of conditions that may affect health or safety. Instead the operator is required to withdraw miners from an area presenting potential imminent danger. The Act defines imminent danger as a "condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j).

No evidence of such imminent danger was presented in this case. Therefore, Clemens incorrectly claims that the pay maintenance provisions of section 101(a)(7) of the Act are triggered through application of standard 57.18-2. Nor should the provisions of 101(a)(7) be read as creating an independent right to continued pay levels upon transfer, as the provision is applicable only where specific regulations regarding the right to transfer have been promulgated. Accordingly, I find that Anaconda had no duty to withdraw or transfer Clemens, and hence no duty to maintain Clemens' salary upon voluntarily granting his request for a transfer.

Summary

I find Clemens' claims of protected activities to be unsubstantiated. Therefore, I conclude that Clemens' pay reduction, following his transfer made for health reasons, does not constitute a prima facie case of discrimination in violation of section 105(c)(1) of the Act. Accordingly, a discussion of appropriate relief for the alleged discrimination is unnecessary.

ORDER

Anaconda's motion, heretofore reserved, is therefore granted and the complaint is dismissed.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

AUG 16 1983

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket NO. WEST 80-6-M
Petitioner	:	A.C. No. 42-00784-05001
v.	:	Docket No. WEST 80-81-M
	:	A.C. No. 42-00550-05001 R
CALVIN BLACK ENTERPRISES,	:	Docket No. WEST 80-82-M
Respondent	:	A.C. No. 42-00784-05002 R
	:	
	:	Blue Lizard and Markey Mines

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor
U. S. Department of Labor, Denver, Colorado
for Petitioner;
Calvin Black, Blanding, Utah,
for Respondent.

Before: Judge Vail

PROCEDURAL HISTORY

In these cases, petitioner seeks to have citations affirmed and civil penalties assessed against respondent Calvin Black Enterprises. Respondent is charged with mine safety violations, and refusal to allow unrestricted MSHA mine inspections. Pursuant to agreement by the parties, the cases were consolidated for hearing and decision. Upon notice to the parties, a hearing on the merits was held on February 9, 1982 in Salt Lake City, Utah under the provisions of the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). Subsequent to the hearing, the parties filed letter memoranda.

ISSUES

1) Was respondent properly charged with safety violations in the Markey Mine, and if so, what civil penalties are appropriate?

2) Were representatives of the Secretary unlawfully barred by respondent from conducting an inspection of respondent's Blue Lizard and Markey Mines, and if so, what civil penalties should be assessed?

Docket No. WEST 80-6-M

Citation Nos. 336808 and 336809 were issued on May 17, 1979, when MSHA inspector Ronald Beason visited respondent's Markey uranium mine near

Blanding, Utah. During the inspection, Beason noted employees of an independent contractor (Sanders Exploration Co.) working underground in conditions allegedly violating mandatory safety standards promulgated under the Act.

Citation No. 336808 charges respondent with violation of mandatory safety standard 30 C.F.R. § 57.15-30 which provides as follows:

> A 1-hour self-rescue device approved by the Mine Safety and Health Administration shall be made available by the operator to all personnel underground. Each operator shall maintain self-rescue devices in good condition.

Beason testified that at the time of his inspection, he observed a geologist and two helpers (all employees of Sanders Exploration Co.) working underground in a return air area without self-rescue devices. The geologist had been issued a self-rescuer, but left it in a jeep approximately 750 feet away. His two helpers had not been issued self-rescuers, nor had they been instructed in the use and need for such devices (Tr. 36, 37, 56). Inspector Beason testified that self-rescuers filter contaminated air, and in the event of a fire, smoke and fumes could overcome employees not equipped with these devices (Tr. 20).

Citation No. 336809 charges respondent with failure to provide adequate escape routes before allowing use of a gasoline-powered jeep underground in the mine. Petitioner contends that such a situation violates mandatory safety standard 30 C.F.R. § 57.4-52, which provides as follows:

> Gasoline shall not be stored underground, but may be used only to power internal combustion engines in non-gassy mines that have multiple horizontal or inclined roadways from the surface large enough to accommodate vehicular traffic. Roadways and other openings shall not be supported or lined with combustible material. All roadways and other openings shall be connected with another opening every 100 feet by a passage large enough to accommodate any vehicle in the mine.

Beason testified that during his mine inspection he observed the geologist and his crew using a jeep approximately 3,000 to 4,000 feet underground, in the fresh air side of a drift. Mine supervisory personnel informed him that the jeep's engine was gasoline-powered. The mine did not have cross-cuts every 100 feet. Such cross-cuts, Beason contends, are necessary to allow workers to bypass an area in the event of fire or air contamination (including that caused by gasoline engine exhaust) (Tr. 40-42).

While respondent does not specifically deny the alleged violations, the citations are contested on several other grounds. First, the geologist and his crew are said to be employees not of the mine, but of an independent

contractor. In addition, respondent claims that on the day of the inspection, the geologists and two helpers arrived at the mine and began working before mine personnel could supervise their activities. Accordingly, respondent suggests that it should not be held responsible for the workers' failure to comply with safety standards. Secondly, respondent's owner maintains that he knows of no fires having ever occurred in uranium mines, and contends that the safety violations are insignificant (Tr. 105). Furthermore, he characterizes the citations in general as being "nit-picky," and suggests that the safety violations were issued by MSHA in an attempt to create a confrontational situation, and set an example in the community (Tr. 106, 112).

I find that respondent's arguments are without merit. It is well established that an owner-operator of a mine can be held responsible without fault for a violation of the Act committed by an independent contractor. In reviewing the Secretary's decision to proceed against an operator for a contractor's violation, the Commission must determine if such choice was made for reasons consistent with the purposes and policies of the Act. Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), aff'd., No. 79-2367 (D.C. Cir. (January 6, 1981); Cyprus Industrial Minerals Company, 3 FMSHRC 1 (January 1981), aff'd, 664 F. 2d 1116 (6th Cir. 1981); Phillips Uranium Corp., 4 FMSHRC 549 (April 1982). Part of such a determination includes an evaluation of the degree of control retained by an operator, and whether the operator's miners are exposed to the hazard.

In this case, the independent contractor was hired by the respondent to conduct geological surveys in an operating mine. The activities involved workers untrained in mine safety, and extended over the period of one year (Tr. 105). Safety violations occurring during the course of such activities endangered not only the employees of the independent contractor, but also employees of the mine. It was therefore the operator's duty to monitor and control the independent contractor's workers and their activities as they affected general mine safety considerations. Accordingly, I find that respondent is liable for the safety violations at issue.

Furthermore, I reject respondent's contention that the citations should be dismissed because they involved "insignificant" safety violations, and represented improper motives on the part of MSHA. The fact that respondent knows of no accidents in uranium mines caused by the safety violations involved in this case does not excuse his non-compliance with mandatory safety regulations. Nor does the evidence show that the inspector had other than proper motives in issuing citations for violations of mandatory safety regulations in this case. I therefore conclude that respondent should be held responsible for violation of the Act's safety standards, and that citation Nos. 336808 and 336809 were properly issued.

Docket Nos. WEST 80-81-M and 80-82-M.

Citation Nos. 336695 and 336696 were issued for respondent's alleged refusal to allow entry by representatives of the Secretary into the Blue Lizard and Markey Mines for the purpose of conducting mine inspections. Respondent is charged with violating section 103(a) of the Act, which

requires that underground mines be inspected at least four times a year, and provides MSHA inspectors with the right of entry to, upon, or through any mine. Advance notice of an inspection is not required.

Ronald Beason (MSHA inspector) and Benjamin Johnson (special investigator for MSHA) testified that on July 2, 1979 they arrived at respondent's Blue Lizard Mine for the purpose of conducting a safety inspection. Johnson had been instructed to accompany Beason following a telephone call from Calvin Black (owner of the Blue Lizard and Markey Mines) to the MSHA area office made shortly after the Markey Mine inspection of May 17, 1979, which resulted in the issuance of two safety violation citations. During the call, Black allegedly stated that he did not intend to allow any further inspections of his mine properties (Tr. 76).

Beason testified that upon arrival at the Blue Lizard Mine, two of respondent's representatives informed Beason and Johnson that they were trespassing, and denied them entry into the mine. The mine representatives claimed that they had neither the authority nor the permission of the owner, Calvin Black, to allow such entry. In addition, they produced a notice issued by Black, stating that no person was to be permitted on the property without specific written permission from the owner. Beason and Johnson were then asked by mine personnel to fill out a form. Although the inspectors orally provided the requested information, they refused to sign the form. 1/ Following further heated discussion, during which the mine representatives were read applicable portions of Section 103(a) of the Act and informed of MSHA's legal right to inspect, Beason and Johnson abandoned their attempt to gain entry to the mine. They had not been specifically informed that they would be prevented from conducting an inspection, but due to the hostile and emotional confrontation, believed that they would be physically restrained from doing so (Tr. 59, 83). Accordingly, citation and withdrawal order No. 336695 was issued.

A second citation No. 336696, with associated withdrawal order, was issued on the same day at the Markey Mine. A similar confrontation and denial of entry allegedly prevented Beason and Johnson from conducting an inspection of that mine (Tr. 28-30, 79).

Respondent, on the other hand, claims that Beason and Johnson were not prevented from conducting an investigation. Instead, under the express orders of respondent's owner, they were given notice that they were trespassing, as anyone else entering the mine property without permission would be (Tr. 108). Such notice, respondent contends, was necessary due to general liability concerns and because the owner "didn't want the MSHA inspectors to

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1/ At the hearing, however, respondent admitted that Beason's "signature" had been added to the form by the mine personnel (Tr. 63-65).

go there without notice and without permission" (Tr. 106, 107). However, respondent's owner testified that mine personnel were given specific instructions not to use force in preventing "trespassers" from entering the mine properties (Tr. 108). Respondent further denies informing MSHA by telephone that inspections subsequent to the one at the Markey Mine would not be allowed. Rather, respondent maintains that the call was made merely to give notice to MSHA of the owner's intent to see an attorney and take appropriate action against people (both MSHA inspectors and others) entering his property without permission (Tr. 107).

Despite respondent's claims that Beason and Johnson were not expressly prohibited from conducting mine inspections, I find that the mine personnel (acting under the owner's express instructions) effectively prevented access to the mines by demanding that notice and permission precede entry onto respondent's property. A mandatory inspection, as provided in section 103(a) of the Act, was therefore obstructed.

Section 103(a) of the Act requires no advance notice before an inspection. Furthermore, although the language of the Act makes no reference to obtaining search warrants or owner permission prior to a mine inspection, courts have recognized a Congressional intent to provide an absolute right of entry to conduct legitimate inspections of mines covered by the Act, without need for a search warrant. Such a mine inspection program has been justified as necessary to protect miners from unusually severe occupational health and safety hazards. Marshall v. Nolichuckey Sand Co., Inc., 606 F. 2d 693 (6th Cir. 1979). In addition, warrantless inspections have been held by the United States Supreme Court to satisfy the constitutional constraints of the Fourth Amendment, since the certainty and regularity of the Act's inspection program provide an adequate substitute to a warrant. Donovan v. Dewey, 452 U.S. 594, 101 S.Ct. 2534 (1981). Failure of an operator to permit an inspection has been held by the Commission to be a violation of the Act, for which a penalty must be imposed. Waukesha Lime and Stone Company, 3 FMSHRC 1702 (July 1981).

In accord with the Act and the above cases, a MSHA inspector's right to inspect a mine is not dependent upon first obtaining permission of entry from an owner. Furthermore, an owner's denial of entry without such permission may reasonably be interpreted as obstructing the exercise of mandatory mine inspections under the Act. Upon encountering such denial of access to a mine, a MSHA inspector need not test his or her need to force entry to conduct an inspection. Upon a careful review of the evidence in this case, I find that respondent's owner required his permission for entry to the Blue Lizard and Markey Mines, and therefore effectively prevented a lawful, warrantless inspection of the premises by representatives of the Secretary. Beason and Johnson identified themselves and their purpose at the mines, and yet were notified by mine personnel that their presence, without permission granted by the mine owner, constituted a trespass (Tr. 13, 29, 94). The mine personnel's statements were authorized by the mine owner, and reflected the owner's admitted desire to prevent MSHA inspectors from entering the property without notice and permission (Tr. 107).

Since the provisions of section 103(a) of the Act and case law do not require notice and permission to precede an inspection, I conclude that Beason and Johnson were effectively denied free and ready access to respondent's mines. The MSHA inspectors were not required to force entry to conduct a mine inspection. Therefore, Beason rightly issued citations based upon respondent's failure to provide unconstrained entry to the mines for the purpose of conducting an inspection mandated by the Act. Accordingly, citation Nos. 336695 and 336696 are affirmed.

PENALTIES

Upon determining that the four citations described above were properly issued, the next issue is determining the appropriate civil penalties to be assessed for each violation. Section 110(i) of the Act sets forth six criteria to be considered in determining the amount of civil penalty:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The Secretary's proposed civil penalties for each of respondent's violations are as follows:

Citation No.	Violation Charged	Amount
336808	30 C.F.R. § 57.15-30	$ 8.00
336809	30 C.F.R. § 57.4-52	10.00
336695	30 U.S.C. § 813(a)	100.00
336696	30 U.S.C. § 813(a)	100.00

Mine History, Size, Financial Status.

At the hearing, no evidence of previous violations was introduced. Eight miners were employed at the Markey Mine, while three worked at the Blue Lizard Mine (Tr. 99, 100). Respondent's owner, Calvin Black, stipulated that payment of the proposed penalties would not impair the company's ability to continue in business (Tr. 45).

Negligence.

Respondent's failure to comply with regulatory requirements involving self-rescuing devices and the operation of gasoline-powered engines underground constitutes ordinary negligence. Under the Act, the mine operator is required to be on the alert for, and correct, conditions representing hazards to the health and safety of people working in the mine. Under the facts of this case, respondent failed to exercise reasonable care in ensuring that all workers in his mine (including employees of an independent contractor) complied with mandatory regulatory requirements.

On the other hand, respondent's violation of section 103(a) of the was intentional and thus the equivalent of gross negligence. Following inspection of the Markey Mine, which resulted in the issuance of citati termed by respondent's personnel as "nit-picky and asinine" (Tr. 56, 11 respondent enforced a policy designed to prevent further inspections wi notice or permission, and denied free mine entry for MSHA inspections. find that such factors support petitioner's request that the associated proposed penalties be increased.

Gravity.

The gravity involved in respondent's violation of mandatory safety standards is moderate. Only two workers were not equipped with self-re devices, and their use of a gasoline-powered jeep would end with the completion of their temporary surveying assignment. In contrast, I con that respondent's violation of section 103(a) of the Act was serious. Respondent's desire to restrict MSHA inspections, and its disdainful at toward citations that had already been issued, indicates disregard for Act and the enforcement of its provisions. Again, such factors indicat the associated proposed penalties should properly be increased.

Good Faith.

While respondent demonstrated good faith in rapidly abating the conditions violating mandatory safety standards, such good faith was no shown in the situation involving respondent's refusal to admit MSHA in- spectors without notice or permission. Upon issuance of citations and withdrawal orders, respondent ignored the withdrawal orders and continu mine operations (Tr. 26, 32, 79). Respondent's attempt to introduce in evidence a document in which the inspector's "signature" had been fille by mine personnel seems to indicate a further lack of good faith.

CONCLUSION

Accordingly, based upon the testimony introduced at the hearing an contentions of the parties, and considering the criteria of section 110 the Act, I conclude that the proposed penalties for respondent's violat the mandatory safety standards stated in Citation Nos. 336808 and 33680 appropriate and should be affirmed.

The Secretary originally proposed penalties of $200 each for citat Nos. 336695 and 336696. That amount was subsequently reduced to $100 e a compliance officer following the operator's assertion that there was personality conflict involved in the issuance of the citations (Tr. 110 Based upon a careful review of all the evidence of record in this case, persuaded that the penalty of $100 each for these two citations is too

The credible evidence of record shows that respondent deliberately attempted to prevent MSHA inspections conducted without notice by requi owner permission prior to entry onto mine property. I find that respon

representatives, in their continued demands for such permission, attempted to discourage and intimidate the MSHA inspectors. I accept as most credible the inspectors' testimony that they believed the mine inspections could not be conducted without continued altercation and the possibility of encountering physical restraint. In addition, respondent's continuation of mining operations following issuance of withdrawal orders reinforces my conclusion that respondent deliberately disregarded MSHA's authority in this matter. Accordingly, I find the penalty as originally assessed at $200 for each violation to be fair under the circumstances. My determination to assess penalties in this case is consistent with Commission decisions, stating that the assessment of penalties during penalty proceedings involves a de novo determination based upon the criteria of section 110(i) of the Act, and information developed in the course of the adjudicatory proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983); Eastover Mining Company, _____ FMSHRC _____ (July 1983) (ALJ).

I therefore assess the following penalties for respondent's violation of a provision of the Act, and its mandatory safety standards:

Citation No.		Amount
336808		$ 8.00
336809		10.00
336695		200.00
336696		200.00
	Total:	$418.00

ORDER

WHEREFORE IT IS ORDERED that citations Nos. 336808, 336809, 336695 and 336697 are affirmed and respondent shall pay the above-assessed penalties totaling $418.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 17 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No: LAKE 82-79 A.C. No: 11-00590-03145
v.	:	
OLD BEN COAL COMPANY, Respondent	:	
OLD BEN COAL COMPANY, Contestant	:	Contest Proceeding Docket No: LAKE 82-67-R Order No: 1222 940; 3/15/82
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), and UNITED MINE WORKERS OF AMERICA, Respondents	:	No. 26 Mine

DECISION

Appearances: Mark M. Pierce, Esq., Chicago, Illinois, for Old Ben Coal Company,
Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Secretary of Labor

Before: Judge Moore

This consolidated review and penalty proceeding was tried in Evansville, Indiana, on October 19-20, 1982. Final briefs for the parties were submitted on January 25, 1983. The parties have been advised that the cases were reassigned to me and, by their silence, are deemed to have waived any objections to my deciding the case on the basis of the record already made.

The controversy involved here stems from a withdrawal order issued on March 15, 1982, charging an unwarrantable failure pursuant to section 104(d), of the Mine Safety Act, for an alleged violation of 30 C.F.R. § 75.1722(a).

On the date in question, MSHA Inspector Wolfgang Kaak, accompanied by his supervisor Michael Wolfe, and Deputy Inspector Gary Brandon, conducted a spot inspection on respondent's No. 26 mine, (Tr. 272). They proceeded underground, and at approximately 10:30 a.m., they arrived at the 12CM-5 area in the 16th East section (Tr. 274).

Once there, Inspector Kaak noticed the belt drive head was not guarded as required in the standard. He then issued Withdrawal Order No. 1222940, which reads in part as follows: "The belt drive for the 12CM-5 belt was not adequately guarded to prevent persons from coming in contact with the moving drive. The guarding had been removed and was lying along the ribs and on the floor." (Tr. 274).

The area that needed guarding was approximately 6 to 8 feet in length along each side of the belt drive. However, other than one 4 foot by 6 foot section on the east side, no guarding was installed. This one installed section matched the pieces of guarding lying on the floor. (Tr. 278, 279, 280, 290-292).

Inspector Kaak's decision to issue the order was based in part on the conditions present at the belt head drive. He determined an accident was likely because the working section was ready to load coal; the belt was energized with the remote control switch in operation; there were repairmen working in the area and the floor was slippery. Voltage on belt starter boxes is usually about 480 volts, the starter box was about five feet from the belt drive. (Tr. 281, 283-284, 292, 293, 295, 310,311).

The belt transported coal from the working unit to a main line belt which then transported the coal out of the mine. When in operation, the belt ran at 350 to 400 feet per minute. If a miner or other person brushed against these rollers while the belt was operating, it was likely they would become caught and injured or killed. Because the belt was in a highly accessible area, and it was common for those in the area to walk close by or underneath the belt, rather than going around it, the chance of such an accident assuming the belt was running, was likely. In fact, Inspector Kaak had been personally involved in one such accident. (Tr. 275-277, 295-297, 307-308, 334.)

Based on these considerations and his determination, caused by his belief that an accumulation of at least one inch of float coal dust covered the sections of guarding on the floor, that the guard had been off for at least one week, Inspector Kaak issued the order. Inspector Wolfe concurred with Inspector Kaak's decision that a 104(d) violation was warranted. (Tr. 282, 310, 314, 332, 337-338, 349).

Respondent asserted that the sections of guarding lying on the floor had been there several months and were not part of the guarding that was supposed to be installed around the 12CM-5 belt drive. (Tr. 366,367, 381). While Old Ben concedes a violation in that at the time of the inspection the drive was not properly guarded, several of its employees denied allegations concerning the duration that the drive was inadequately guarded.

On March 16, 1982, Kenny Kondoudis, a belt shoveler and UMWA Safety Committeeman, told Inspector Kaak that the guarding was on the belt drive in question the night before and that he had not taken the guarding off to clean the drive. (Tr. 363-365, 376-77). Kondoudis had, Inspector Wolfe claimed, reported to him during the hearing that he had been confused about which belt drive the citation had been written on. (Tr. 351-3). However, he was not called as a witness and as Old Ben pointed out, Kondoudis was very familiar with the areas of the mine. (Tr. 399).

Later, on the day the citation was issued, Old Ben had a crew reinstall guarding on the 12CM-5 belt drive. In place of the hog wire type screen that the old guarding and sections on the floor were made of, a new wire mesh type guarding was installed. (Tr. 386-387, 390-303).

One additional fact concerning the Pre-Shift Report deserves mention. Normally, the preshift examiner for the 8:00 a.m. shift would have observed the belt drive at approximately 5:00 a.m. (Tr. 379). However, the Pre-Shift Exam Book (Exhibit R-4), contained no reference to the missing guard. (Tr. 377-379, 391).

Old Ben concedes and the evidence clearly establishes that a violation of 30 C.F.R. 75.1722(a), did occur. Old Ben contends that Withdrawal Order No. 1222940 was improperly issued under Section 104(d)(1) and should be vacated and "declared void ab initio" for three reasons:

(1) It is not based on a valid underlying citation issued under Section 104(d)(1). This citation (No. 1222597 dated 3/11/82) was upheld in the bench decisions in related dockets numbered LAKE 82-85 and LAKE 82-66-R.

(2) That the conditions cited in Order No. 1222940 did not meet the significant and substantial criteria of 104(d), the conditions then in existence "did not pose a reasonable likelihood that an injury would occur."

This argument is rejected for two reasons. First, the facts in existence when the subject order was issued did show that this was a significant and substantial violation. Second, Old Ben's attorneys have demonstrated in their West Virginia Law Review article (attachment 2 to the brief) "significant and substantial" is not a necessary finding for a 104(d)(1) order.

(3) The final argument is that the cited violation did not constitute an unwarrantable failure under 104(d)(1). In order to be considered unwarrantable, Old Ben's failure to comply with the mandatory safety standard must have been a result of its negligence, or attributable to it through the negligence of its

As stated, there was a clear violation of 30 C.F.R. §75.1722(a), a mandatory safety and health standard. However, for such violation to be unwarrantable the violative condition must have been one that the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care.

The determination of whether Old Ben should have known about the violation largely depends on how long it was in existance. If, as Inspectors Kaak and Wolfe represented, the guard on the 12CM-5 belt had been off "for at least one week", it would be easy to infer that Old Ben "knew or should have known" about the violation. The belt drive was in an easily accessible working area of the mine.

However, this inference can not be so easily drawn if the guard had been in place during the previous shift as Old Ben contends. At best, the circumstances surrounding the guarding's removal are questionable. There is no evidence to support Inspector Kaak's assumption that the pieces of guarding on the floor were part of the missing guarding. In fact, when later on that day the guarding was reinstalled, a new wire mesh type, different from what was found on the floor, was installed. The discovery of these sections and the Inspector's determination that they had been there for at least one week forms the basis of the Secretary's contention that the guarding had been off for a period long enough for Old Ben to have known about the violation.

This evidence is not strong enough to rebut Old Ben's contrary evidence. This contrary evidence consists of:

(1) The direct testimony of Donald Kellerman, the belt supervisor, that the 12CM-5 belt drive was properly guarded at 3:30 a.m. the morning the citation was issued.

(2) UMWA Safety Committeeman Kenny Kondoudis' report to his supervisors and Inspector Kaak that the 12CM-5 belt drive had been properly guarded that morning.

(3) The failure of the Pre-Shift Exam Report, filled out at approximately 5:00 a.m. that morning, to indicate any irregularity in the guarding on the 12CM-5 belt drive.

The only rebuttal to this evidence was Inspector Wolfe's assertion that Kenny Kondoudis admitted to him that he had been confused about which belt drive was in question. However, Kondoudis was thoroughly familiar with the mine. Additionally, several persons had heard him say that the guard had been up. (Tr. 351, 364, 398). Inspector Wolfe's assertion that Kenny Kondoudis was confused stands alone.

The weight of evidence points in favor of Old Ben and its contention that the belt drive had been properly guarded earlier that morning. Thus, since the circumstances surrounding the occurrence of this violation are unknown, the Secretary's determination that the violation occurred as a result of Old Ben's unwarrantable failure to comply with the relevant safety standard is found to be unsupportable. The inference that Old Ben "knew or should have known" of the violation can not stand based on the evidence as presented. In this case, it has been found that the violation did not occur as a result of the unwarrantable failure of the mine operator to comply with the cited standard, thus failing the (d)(1) criteria. However, the significant and substantial finding as well as the underlying (d)(1) citation have been upheld. Accordingly, Withdrawal Order No: 1222940 is modified to reflect that it is a citation issued pursuant to § 104(a) of the Act.

As to the penalty, there was no negligence proved and based on prior findings with respect to the likelihood of an accident occurring due to the violative condition, and the injuries which could have resulted therefrom, I conclude that the violation was serious.

I find that Old Ben is a large coal mine operator but not one of the giants of the industry; it has an unsatisfactory history of previous violations; and Old Ben proceeded in good faith to achieve compliance with the violated safety standard after receiving notification of the violation.

Weighing these various factors, it is concluded that a penalty of $300 is appropriate and the same is assessed.

ORDER

(1) Old Ben is ordered to pay a civil penalty of $300 to the Secretary of Labor within 30 days of the issuance of this decision.

(2) All proposed findings of fact and conclusions of law not incorporated herein are rejected.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

AUG 18 1983

OLD BEN COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No: LAKE 82-75-R
	:	Order No: 1223403 3/3/82
v.	:	
SECRETARY OF LABOR, and UNITED MINE WORKERS OF AMERICA, Respondents	:	

DECISION

Appearance: Mark M. Pierce, Esq., Old Ben Coal Company, Chicago, Illinois, for Contestant; Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Respondents.

Before: Judge Moore

The above case was re-assigned from Judge Lasher to me on June 23, 1983. Withdrawal order No: 1223403 was issued under §104(d)(1) of the Federal Mine Act and the underlying citation listed on the order is No: 1222957 issued on March 11, 1982. The matter came on for hearing before Judge Lasher on October 20, 1982, in Evansville, Indiana. At that time certain stipulations were read into the record. Old Ben admits the violation occurred, admits it was due to an unwarrantable failure and that it was significant and substantial. In fact it has agreed to pay the full proposed assessment associated with this citation. It challenges, however, the technical validity of the order.

Old Ben argues that the underlying citation was invalid. It also argues that even if the underlying citation is valid, the order in issue in this case is not valid because it should have been issued under §104(d)(2) instead of 104(d)(1). Old Ben argues that once a citation is issued under §104(d)(1) only one order can be issued thereafter under that section. It bases this argument on the fact that the wording of the section states that if the inspector finds an unwarrantable violation within 90 days after issuing

the citation "he shall forthwith issue an order requiring . . . ." Old Ben contends that that section does not authorize issuing multiple orders under 104(d)(1).

I disagree. If a 104(d)(1) citation is issued early in an inspection and shortly thereafter a 104(d)(1) order is issued, any additional order for unwarrantable failure issued during that inspection would have to be issued under §(d)(1). The (d)(2) orders can only be issued during "any subsequent inspection . . . ." Old Ben's interpretation would not allow for the issuance of (d)(1) orders during the same inspection in which the (d)(1) citation was issued and for that reason alone is incorrect. I would agree, however, that once a (d)(1) order is issued, that any unwarrantable violation found during a subsequent inspection, should be issued under 104(d)(2).

At the time that the briefs were prepared Judge Lasher had already rendered a bench decision in which he had upheld the underlying 104(d)(1) citation. Counsel for Old Ben nevertheless requested Judge Lasher to vacate the order because Judge Lasher's decision on the underlying citation was erroneous. No reasons as to why counsel thought the decision to be erroneous were given. It is curious as to how counsel expected to prevail in that kind of argument.

I can see no difference in the effect of the two orders that can be issued under §104(d). Once the orders start issuing they continue until an inspection of the mine "disclose no similar violations." Such an inspection puts the operator back at the beginning of 104(d)(1). I therefore can not see any prejudice to Old Ben resulting from the fact that this order was issued under a (d)(1) rather than a (d)(2).

In Secretary of Labor v. Old Ben Coal Company, 2 FMSHRC 1187 (June 1980) the Commission approved Judge Broderick's treatment of a notice of violation and 3 withdrawal orders issued under (104)(c) of the 1969 Coal Act. All of the withdrawal orders had been issued under § 104(c)(1) of the old act, but only one of the three had been issued within 90 days of the notice of violation. The Commission held that the effect of Judge Broderick's decision was to modify the third and fourth orders so as to base them on the first order rather than on the notice of violation. The Commission said he had that authority.

In Secretary of Labor v. Consolidation Coal Company, FMSHRC 1791 (October 1982) the Commission approved Judge Melick's action of converting a 104(d)(1) order into a 104(d)(1) citation and then holding a hearing on the citation. Judge Melick had earlier held the original 104(d)(1) citation upon which the order in question was based to be invalid.

Counsel for Old Ben Coal Company considers the Commission's 1980 Old Ben Company case discussed above as "ill-advised, unsound and premature . . . ." (See brief at P.14). The brief goes on to urge Judge Lasher, and me by substitution, "to discount" the Commission's decision. I have no authority to disregard or "discount" a Commission decision and I am surprised that counsel would urge that action.

In my view both of these cases are helpful to Old Ben. Relying on these cases, I am converting the instant § 104(d)(1) order to a § 104(d)(2) order. Since the citation was issued during an "ABC" inspection and the order in question here was issued during a "CAA" inspection, this order was issued during a subsequent inspection and should have been issued under § 104(d)(2).

As such, its validity does not depend on the validity of the 104(d)(1) citation but on the validity of 104(d)(1) order No: 1222940 which was converted to a 104(a) citation in Docket No: LAKE 82-67-R.

The order therefore fails since it is not underlain by a valid 104(d)(1) order. But because Old Ben admits the violation was unwarrantable and significant and substantial, I can not convert the order to a 104(a) citation. I hereby convert it to a 104(d)(1) citation and as such it is AFFIRMED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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19 AUG 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 81-62-M
	:	A.C. No. 01-01112-05002R
v.	:	
	:	Riverside Pit & Plant
RIVERSIDE CLAY COMPANY, Respondent	:	

DECISION

Appearances: Terry Price, Esq., Office of the Solicitor, U.S Department of Labor, Birmingham, Alabama, for Petitioner;
Lee H. Zell, Esq., Berkowitz, Lefkovits and Patrick, Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Petitioner seeks a civil penalty for an alleged violation of section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) ("the Mine Act"), for Respondent's refusal to permit a duly authorized representative of the Secretary of Labor to conduct an inspection of its facility. Respondent contends that its facility is not a mine but a refractory plant, and that pursuant to an Interagency Agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"), the jurisdiction to regulate the facility is under OSHA. Pursuant to notice, the case was called for hearing in Birmingham, Alabama, on April 12, 1983. Barton M. Collinge and Lawrence J. E. Hofer testified on behalf of Petitioner. John C. Morris and Denis A. Brosnan testified on behalf of Respondent. Both parties have filed posthearing briefs with proposed findings of fact and conclusions of law. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. Respondent operates a clay pit from which it extracts clay and a plant, located several miles from the pit, in which it produces a refractory clay called Alapatch and various other clay and non-clay refractories which it sells to customers.

2. The plant employs about 60 workers, five of whom are engaged in milling the clay preparatory to either bagging it and shipping it to customers, or transporting it to a mixing area in the plant.

3. In the mixing area the clay is mixed with other materials including silicon carbide, graphites, tar and other materials to make products such as anhydrous tap hole materials used in blast furnances, plastic refractories, and castable refractories. Alapatch is used in some of the refractory manufacturing processes, as well as clay from other sources. Thus, some of the plastic refractories contain Alapatch and some do not. The so called neutral refractories and fixed shape refractories, also produced at the plant, do not contain Alapatch.

4. In fiscal year 1981, approximately 70 to 75 percent of the dollar volume of Respondent's sales from the plant was received for refractory specialties and 25 to 30 percent for Alapatch.

5. MSHA conducted regular, spot and survey inspections of Respondent's Pit and Plant beginning in August, 1973. [Respondent does not contest MSHA's jurisdiction to inspect its clay pit, but only its jurisdiction over the plant]. The last regular inspection was conducted on May 8, 1979. An accident investigation was conducted at the plant on February 4 and 5, 1981, following a fatal accident on February 3. On February 10 and 11, an attempt was made to follow up the investigation and the inspector was refused entry. This proceeding arose out of that refusal of entry.

6. On May 9, 1979, following the execution of an Interagency Agreement between MSHA and OSHA on March 29, 1979, MSHA notified Respondent by letter that it was agreed that refractory clay operations such as Respondent's plant would come under the authority of OSHA while the clay mining would remain under MSHA. On September 6, 1979, this decision was reversed and Respondent was notified that MSHA and OSHA agreed that MSHA would have jurisdiction over the pit and plant. OSHA has never inspected the plant.

7. Section A(3) of the Interagency Agreement provides that the Mine Act would apply to mine sites and milling operations, except where the Mine Act does not cover or apply to occupational safety and health hazards on mine or mill sites (e.g. hospitals on mine sites), or where no MSHA standards are applicable, then the OSHAct would be applied.

8. Section B(2) of the Agreement refers to the Mine Act which gives MSHA authority over mineral extraction and mineral milling, and directs the Secretary in making a determination of what constitutes mineral milling, "to give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment."

9. Section B(4) of the Agreement provides that the term milling may be expanded to apply to mineral product manufacturing processes which are related to milling or the term may be narrowed to exclude processes listed in Appendix A where such processes are unrelated technologically or geographically to mineral milling. Determinations shall be made by agreements between MSHA and OSHA.

10. Section B(5) of the Agreement provides that the following factors shall be considered in determining what constitutes mineral milling: the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility under Mine Act coverage.

11. Section B(6)(b) provides inter alia that OSHA jurisdiction includes refractory plants whether or not located on mine property.

12. Section B(8) provides that questions of jurisdiction shall be resolved if possible by MSHA District Manager and OSHA Regional Administrator in accordance with this agreement and existing law and policy. If a question cannot be resolved at the local level it will be transmitted to the National offices and, if necessary, to the Secretary.

13. Appendix A to the Agreement defines milling as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." The Appendix further provides that milling consists

of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting, leaching, and briquetting. Each of these processes is defined in the Appendix.

ISSUE

Whether MSHA has jurisdiction under the Mine Act to inspect the operation of Respondent's Plant.

CONCLUSIONS OF LAW

1. The Federal Mine Safety and Health Review Commission and the undersigned Administrative Law Judge are empowered to determine whether the operation of the facility in question come within the coverage of the Mine Act. "MSHA's authority to regulate a workplace is determined by the scope of the Mine Act's coverage . . . ." Secretary v. Carolina Stalite Company, 4 FMSHRC 423, 425 (1982).

2. Doubts as to whether a facility is covered under the Mine Act are to be resolved in favor of coverage.

DISCUSSION

In its Report on S. 717 which became the Mine Act, the Senate Committee Human Resources stated

> "The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act."

S. Rep. No. 95-181, 95th Cong., 1st Sess. at 14 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 602 (1978).

3. The Mine Act includes in its coverage the "milling of . . . minerals, or the work of preparing . . . minerals." Section 3(h)(1) of the Act directs the Secretary "in making a determination of what constitutes mineral milling" to "give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment."

4. Although the MSHA-OSHA Interagency Agreement cannot finally determine the jurisdiction of the agencies involved, Secretary v. Carolina Stalite Company, supra, the Commission will give due deference to the interpretation of that agreement advanced by the Secretary.

5. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the Riverside Plant.

DISCUSSION

It is clear and Respondent concedes that part of the work performed in the Plant consists of mineral milling and is therefore under the coverage of the Mine Act. Respondent argues that milling constitutes only a small part of the operation of what is essentially a refractory plant. The expert witnesses for Petitioner and Respondent differ sharply in their definition of refractory. MSHA's expert testified that in his opinion at least some of the refractory producing activities in Respondent's plant involved milling. The Commission observed in Carolina Stalite, supra at p. 424 that ". . . 'milling' and 'preparation' can be perceived as words used, in a loose sense, interchangeably to describe the entire process of treating mined materials for market . . . we believe the 1977 Mine Act's use of both terms signals an expansive reading is to be given to mineral processes covered by the Mine Act, rather than requiring a clear distinction between what is a milling or a preparation process."

I conclude based on an expansive reading of the term that at least a part of Respondent's refractory production (that using mined or milled minerals) involves the milling or preparing of minerals and therefore comes under the Mine Act. All of the work at the Plant is performed in a single facility, although in separate buildings. The Secretary has determined that administrative convenience would be served by delegating the authority over health and safety at Respondent's plant to MSHA even though part of the plant activities would normally fall under OSHA's jurisdiction. The Mine Act gives the Secretary this authority and there is no evidence in this case to justify the Commission's overturning his exercise of that authority.

6. The refusal of Respondent to permit the MSHA inspector to enter its plant to conduct an inspection is a violation of section 103(a) of the Mine Act.

7. Respondent is not a large operator. It employs 60 people at its plant and an unknown additional number at its clay pit. From July 1, 1980 to February 28, 1982, its sales of Alapatch amounted to $352,376.11, and its sales of "specialties" amounted

to $2,639,781.84. From July 1, 1982 to December 31, 1982, it sold 276,085.86 Alapatch and 1,995,160.85 specialties. I conclude that it is of moderate size.

From August 1973 to February 1981, approximately 274 violations were assessed against Respondent's pit and plant. I conclude that this is a moderate history and a penalty otherwise appropriate in this case should not be increased because of it. There is no evidence that a penalty in this case will have any effect on Respondent's ability to continue in business, and I conclude that it will not.

8. I conclude that the violation here was very serious. It involved the refusal to permit an inspector to follow up on a fatality investigation. The facts surrounding the fatality are not part of the record in this case, but such an investigation is of the greatest importance to the proper enforcement of the Act and the protection of the safety and health of the employees. Cf. Secretary v. Waukesha Lime & Stone Company, 1 FMSHRC 512 (1979) (ALJ).

9. Respondent contends that any penalty assessed in this case should be nominal since Respondent is merely seeking through this proceeding to have a determination made as to whether MSHA or OSHA has jurisdiction. But the evidence shows that MSHA has inspected the facility for many years. Although one letter from MSHA indicated that OSHA had jurisdiction, it was promptly corrected. OSHA has never inspected the facility. It is important to note that Respondent's refusal to admit the inspector followed a fatal injury to an employee. I conclude that Respondent knew or should have known that MSHA had authority to inspect. The violation was willful.

10. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation is $500.

ORDER

Based on the above findings of fact and conclusions of law, Respondent is ORDERED to pay the sum of $500 within 30 days of the date of this decision for the violation found herein to have occurred.

James A. Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 22, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 83-32 A.C. No. 46-01436-03509
v.	:	
	:	Shoemaker Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

ORDER TO SOLICITOR TO SUBMIT INFORMATION

The Solicitor has filed a motion to withdraw his Petition for the Assessment of Civil Penalty in this case.

The subject citation was issued on May 7, 1982, for a violation of 30 C.F.R. § 75.200 because center bolting was not completed within 24 hours as required by the approved roof control plan. According to the Solicitor the inspector determined that center bolts had not been installed at the cited location for a period of 34 hours.

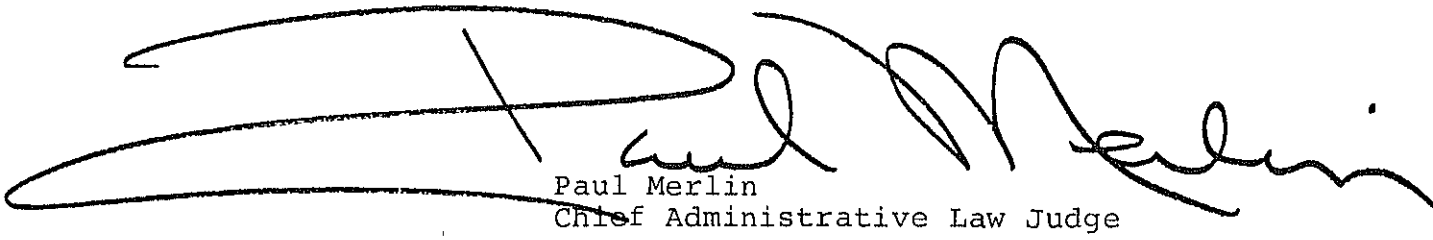
However, the Solicitor further states that "The condition had been abated even before issuance of the citation."

The Solicitor then states that the operator has paid the penalty assessment of $20.

If as the Solicitor states, the condition was corrected before the citation was issued then no violation existed at the critical time. Republic Steel Corp., 5 FMSHRC 1158 (June 1983). Under such circumstances the citation should not have been issued and no penalty should have been assessed. It is inconsistent for the Solicitor to seek to withdraw his penalty petition and at the same time allow the operator to pay a $20 penalty.

Accordingly, the Solicitor should review this matter and determine whether or not a violation actually existed at the time the citation was issued and if it did not, then to free the operator of liability.

In light of the foregoing, it is Ordered that the Solicitor advise me with respect to the foregoing within 30 days of the date of this order.



Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 23 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No: WEST 82-48 A.O. No: 42-00121-03103 Docket No: WEST 82-80 A.O. No: 42-00121-03106 H Deer Creek Mine
v.	:	
EMERY MINING CORPORATION, Respondent	:	
and		
EMERY MINING CORPORATION, Applicant	:	CONTEST PROCEEDINGS Docket No: WEST 81-400-R Order No: 1022357; 9/9/81
v.	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Deer Creek Mine

DECISION ON REMAND

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Evert W. Winder, Manager, Health and Safety, Emery Mining Corporation, Huntington, Utah,
Todd D. Peterson, Esq., Attorney for Respondent

Before: Judge Moore

On August 11, 1983, the Commission remanded the above case to me for the purpose of assessing the appropriate civil penalty. The Commission has decided that the violations occurred, hence I have only the criteria to consider. The regulation in question states:

> "each miner shall receive a minimum of 8 hours of annual refresher training as prescribed in this section."

The company and I interpreted the words "annual refresher training" as meaning once every calendar year. The government argues that the words mean "within 12 months", but in its appeal brief sort of "weazel" words it in such a way that it means every 13 months (see government exhibit 1 and page 9 of the government's main brief). The Commission interprets the words to mean "within 12 months of the last received training". */

The Commission's ruling necessitates the recision of government exhibit 1, which is a MSHA policy memorandum No: 81-2ET. MSHA is accordingly ordered to rescind that policy memorandum.

I can not find that the respondent was negligent when I agree with respondent's interpretation of the regulation. The fact that the Commission disagreed does not mean that respondent was negligent. I therefore find no negligence.

There was no gravity proved and I therefore find none. Also, the fact that MSHA approved respondent's refresher training plan, militates against substantial penalties. A total penalty of $100 is assessed for all violations involved.

Emery Mining Company is accordingly ORDERED to pay to MSHA within 30 days, a civil penalty in the total sum of $100.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

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*/ The Commission's ruling will result in the continual advance of the retraining date. If a miner is trained on June 5 of one year then June 5 of the following year is not within the last 12 months. A miner must be retrained before June 5.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 29, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 83-37-M A.C. No. 45-00727-05501
v.	:	
	:	East Salah Pit & Plant
YAKIMA CEMENT PRODUCTS COMPANY, INC., Respondent	:	

FURTHER ORDER TO SUBMIT INFORMATION

In response to my order of July 15, 1983, the Solicitor now has submitted a response. The response sets forth the size of the operator's business, history of prior violations, good faith compliance and ability to continue in business.

However, with respect to negligence and gravity the Solicitor merely refers me to Items 20 and 21 on each citation. In my prior order I stated that I could not approve settlements based upon checking boxes when no reasons are given. I adhere to this view. Other Regional Solicitors in response to orders just like the one issued in this case have submitted the necessary information in order for their proposed settlements to be approved. I do not see why I should accept anything less from this Regional Solicitor. I particularly note settlement motions recently received from the Regional Solicitor, Philadelphia and the Regional Solicitor, Nashville.

It is hereby Ordered that within 45 days of the date of this order the Solicitor file information adequate for me to determine the statutory criteria of negligence and gravity sufficient to make a determination as to proper penalty amounts.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 30 1983

UNITED MINE WORKERS OF AMERICA (UMWA) on behalf of DONALD E. COLCHAGIE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 82-323-D
v.	:	PITT CD 82-13
CONSOLIDATION COAL COMPANY, Respondent	:	Renton Mine

DECISION

Appearances: Joyce A. Hanula, United Mine Workers of America, Washington, D. C. for Complainant; Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of the United Mine Workers of America (Union) on behalf of Donald E. Colchagie, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," alleging that the Consolidation Coal Company (Consol) discriminated against Mr. Colchagie in violation of section 105(c)(1) of the Act[1] by: (1) failing to pay him in accordance with Section 103(f) of the

[1]Section 105(c)(1) of the Act provides in part as follows:

> No person shall *** in any manner discriminate against or *** cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners *** in any coal *** mine subject to this Act *** because of the exercise by such miner [or] representative of miners *** on behalf of himself or others of any statutory right afforded by this Act.

Act[2] for accompanying a Federal Mine Safety and Health Administration (MSHA) inspector on a mine inspection during the 8:00 a.m. to 4:00 p.m. shift on Monday, April 5, 1982, and (2) issuing him an unexcused absence for missing his regular 12:00 midnight to 8:00 a.m. shift on April 6, 1982. Evidentiary hearings were held on the complaint in Washington, Pennsylvania.

During relevant times, Donald Colchagie was an elected member of the Union safety committee at the Renton Mine. On Friday, April 2, 1982, in accordance with the provisions of Section 103(f), Mr. Colchagie accompanied MSHA inspector Richard Zilka as the representative of miners on a mine inspection. On April 5, 1982, after completing his regular 12:00 midnight to 8:00 a.m. work shift, Mr. Colchagie met Inspector Zilka for a continuation of the inspection.[3]. Colchagie left the mine between 4:30 and 5:30 p.m. that day. He then lived only ten to fifteen minutes driving time from the mine. He did not report for his regular 12:00 midnight to 8:00 a.m. shift on Tuesday, April 6, 1982, and was given an unexcused absence. Although Colchagie was paid for his regular workshift on April 5, 1982, (12:00 midnight to 8:00 a.m.), he was not given any additional "walkaround" pay for accompanying Inspector Zilka on the inspection performed during the 8:00 a.m. to 4:00 p.m. shift on April 5.

The Union first alleges that Mr. Colchagie was discriminated against because he was not given "walkaround" pay for the 8:00 a.m. to 4:00 p.m. shift on April 5, 1982, purportedly in viola-

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[2]Section 103(f) of the Act provides in part as follows:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. ***.

[3]It is not alleged that it was necessary for Mr. Colchagie to be present at this inspection on the grounds that it was a continuation of the earlier inspection.

tion of that part of section 103(f) which requires that the representative of miners who is also an employee "shall suffer no loss of pay during the period of his participation in the inspection". However, since Mr. Colchagie had already worked on the 12:00 to 8:00 a.m. shift on April 5, 1982, was paid for that work, and was not scheduled to work on the 8:00 a.m. to 4:00 p.m. shift, I find that indeed he did not suffer any loss of pay during the period of his participation in that inspection on the 8:00 a.m. to 4:00 p.m. shift. See UMWA, ex rel. Norman Beaver v. North American Coal Corporation, 3 FMSHRC 1428 (1981). Since there was accordingly no adverse action taken against Colchagie in this regard, there was no unlawful discrimination against him under section 105(c)(1). Secretary, ex rel. David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom Consolidation Coal Co. v. Secretary, 663 F. 2d 1211 (3d Cir. 1981).

The Union would attempt to distinguish the Beaver case on the grounds that Mr. Colchagie, unlike Mr. Beaver, was purportedly the only qualified miner available to accompany Inspector Zilka on the April 5 inspection. The evidence does not, however, support the distinction. According to the undisputed testimony of Inspector Zilka, the sole purpose of his visit at that time was to continue interviewing motormen in regard to the "drags", i.e., an emergency braking mechanism on the coal cars. In fact, it is clear that Zilka had already interviewed most of the motormen before Colchagie appeared and, according to Zilka, there was no need for Colchagie to have been present for those interviews.

It is undisputed, moreover, that another safety committeeman, Phil Mastowski, or any other miner working the 8 a.m. to 4 p.m. shift on April 5 could have accompanied Inspector Zilka and could have received "walkaround" pay for that service. Mastowski admitted that he could have accompanied Zilka at that time and was aware of the problem with the "drags" from discussions at a safety committee meeting. The fact that Mastowski may not have physically examined the "drags" up to that point in time would not, of course, have necessarily made him unqualified, or even less qualified, to have accompanied the inspector. Under these circumstances, it is apparent that Colchagie was not the only miner or representative of miners capable of accompanying the MSHA inspector during his interviews and that Colchagie was not uniquely qualified to perform this function.

The Union also argues, however, that there was unlawful discrimination against Colchagie because he was denied an excused absence for failing to work his regular 12 midnight to 8 a.m. shift on the following day, April 6. He claims that he was charged with an unexcused absence because of his participation in the walkaround on the 8 a.m. to 4 p.m. shift on April 5. Since

there is no dispute that Mr. Colchagie's participation in the walkaround was a protected activity, the issue is whether the operator was motivated in any part by this protected activity in giving Colchagie an unexcused absence for his failure to work on April 6. Pasula, supra.

In particular, Colchagie claims that since he had worked his regular 12:00 midnight to 8:00 a.m. shift on April 5, and had "double shifted" that day by accompanying Inspector Zilka during his interviews on the 8:00 a.m. to 4:00 p.m. shift, he was too tired to report for his regular 12:00 midnight to 8:00 a.m. shift on April 6. I note, however, that according to Colchagie himself, he left the mine between 4:30 and 5:30 p.m. on April 5 and lived only ten to fifteen minutes travel time from the mine. In spite of his alleged fatigued condition, however, he did not retire to bed until sometime after 10:30 or 11:00 that night. Since Colchagie did not use the more than six hours between shifts to rest, I do not find his alleged inability to work his regular 12 midnight to 8 a.m. shift on April 6th to be reasonably related to his "walkaround" with Inspector Zilka on the afternoon of April 5th.

In addition, Mr. Colchagie has failed to cite any case in which any other employee who had similarly double shifted had received an excused absence from reporting to his regular work shift after a similar break between shifts on the basis of his previous double shifting alone. Indeed, according to the undisputed testimony of Mine Superintendent Hathaway, it was not uncommon for miners to work their regular shift after having "double shifted" eight hours before that regular workshift. Moreover, it is undisputed that no one had ever been granted an excused absence under those circumstances.

The issuance of an unexcused absence on the facts of this case was also consistent with of Consol's Attendance Control Program (Operator's Ex. 1). Item (a)(7) of the program provides as follows:

> Management may excuse days off for good cause provided: (a) the employee has made a reasonable effort to notify management in advance of the absence; and (b) written verification is furnished, addressing the reason for the absence. Management will make a determination of good cause on an individual case by case basis.

According to Superintendent Hathaway and the records clerk, there was no evidence in the company records that Mr. Colchagie had notified management to request an excused absence prior to his shift on April 6, 1982. While this testimony does not in

itself prove that Colchagie did not call in and credible evidence exists that Colchagie did in fact call in to notify management of his anticipated absence, there was admittedly no written verification addressing the reasons for the absence. Hathaway testified, moreover, that even had Colchagie given proper notice, he would not have been granted an excused absence, since the basis for his absence, i.e., doubleshifting under these circumstances, had never been accepted as "good cause". As previously noted, an excused absence had never previously been granted for any other person under similar circumstances.

Under all the circumstances, I cannot find that in denying Mr. Colchagie an excused absence for his regular workshift on April 6, 1982, Consol treated him in any discriminatory manner. Thus, the Complainant has not succeeded in establishing a prima facie case of unlawful discrimination under the Act. Accordingly, the complaint is denied and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

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AUG 30 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 82-387 A. C. No. 46-01816-03501
v.	:	Gary No. 50 Mine
U. S. STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Steffey

A hearing in the above-entitled proceeding was held in Beckley, West Virginia, on May 10, 1983, under section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977. Simultaneous initial posthearing briefs were filed on July 13, 1983, by counsel for both petitioner and respondent. Counsel for petitioner filed on July 25, 1983, a reply to respondent's brief.

Issues

The petition for assessment of civil penalty filed on October 27, 1982, by the Secretary of Labor in Docket No. WEVA 82-387 seeks to have civil penalties assessed for one alleged violation of 30 C.F.R. § 75.1106-2(c) and two alleged violations of 30 C.F.R. § 75.1003. Counsel for the Secretary stated at the hearing that one of the citations (No. 1066939) alleging a violation of section 75.1003 had been vacated and moved that the petition for assessment of civil penalty be withdrawn with respect to that alleged violation. I granted the motion at the hearing (Tr. 5) and indicated that my decision would reflect the Secretary's withdrawal of the petition to that extent.

Counsel for U. S. Steel Mining Co., Inc. (USS) indicates in her brief (p. 2) and stated at the hearing (Tr. 6) that she is not contesting the question of whether violations of sections 75.1106-2(c) and 75.1003 occurred, but only that the

circumstances cited by the inspector did not constitute "significant and substantial" violations as that term has been defined by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981).

The second issue raised by the petition for assessment of civil penalty is the amount of the civil penalty which should be assessed for each violation. Counsel for USS contends in her brief (p. 6) and argued at the hearing (Tr. 6-7) that a judge is required to assess the civil penalty of $20 provided for in 30 C.F.R. § 100.4 if the judge finds that an alleged violation is not significant and substantial.

Findings of Fact and Decision as to Citation No. 1066938 dated May 6, 1982

Findings

The parties entered into four stipulations which apply to consideration of both violations. Those are as follows: (1) The administrative law judge has jurisdiction to hold a hearing and decide the issues. (2) USS and the Gary No. 50 Mine are covered by the Act. (3) USS is a large operator and the No. 50 Mine is a large mine. (4) During the 24 months preceding the occurrence of the violations here involved, USS was cited for 288 alleged violations and there were 1,086 inspection days.

The preponderance of the evidence supports the following findings of fact:

1. Earl Barnett, a duly authorized representative of the Secretary for the past 14 years and with 34 years of mining experience before becoming an inspector, works out of MSHA's Princeton, West Virginia, subdistrict office (Tr. 9-10).

2. Barnett was requested by his supervisor to make a haulage survey after occurrence of a fatal accident involving a collision of vehicles in the Gary No. 50 Mine (Tr. 29; 98).

3. Barnett arrived at the No. 50 Mine on May 6, 1982, about 7 a.m. and checked some personnel haulage equipment just before the mantrips were due to enter the mine at about 8 a.m. (Tr. 23; 120). Barnett observed on the floor of one of the buses used to transport people into the mine a cylinder of oxygen and a cylinder of acetylene (Tr. 23; 110; 124). Barnett advised Russell Burge, USS's senior mine inspector, that the cylinders would have to be removed from the bus or mantrip and Burge instructed some men to remove them from the mantrip. The cylinders weigh about 50 or 60 pounds and are about 4-1/2 to 5 feet in length (Tr. 23; 78; 90; 123).

4. Inspector Barnett wrote Citation No. 1066938 alleging a violation of section 75.1106-2(c) because that regulation provides that "[l]iquefied and nonliquefied compressed gas cylinders shall not be transported on mantrips."

5. The bus or mantrip in which the cylinders were found was about 18 feet long and consisted of three compartments (Tr. 35; 149). The two end compartments were covered, while the center portion was open (Tr. 46; 69; 123). From 3 to 4 persons could ride in either end of the bus, but up to 8 miners could ride in the uncovered or center portion of the bus (Tr. 95).

6. Both Barnett and Floyd Cox, a UMWA safety committeeman who accompanied Barnett on his inspection and who has worked as a welder for USS for about 6-1/2 years, understood that when the two cylinders were taken from the bus or mantrip, they were taken to USS's shop (Tr. 23; 75; 91-92; 115). As a matter of fact, however, when the cylinders were removed from the bus, they were placed in another vehicle exactly like the bus from which they were removed except that the vehicle in which they were placed had no cover over any part of it because the top had been removed to facilitate use of the other vehicle by shop personnel (Tr. 123). Since the vehicle in which the two cylinders were placed after removal from the bus had no top to interfere with placement of long objects in the vehicle, the two cylinders were placed in a semi-upright position and were steadied on the way into the mine by the mechanics who rode in the same compartment with the cylinders (Tr. 123; 127).

7. Burge said that the cylinders were transported into the mine in the second vehicle along with personnel because he had been advised by an MSHA supervisory inspector from MSHA's Pineville Office that oxygen and acetylene cylinders could be transported in a jeep or other vehicle, so long as the cylinders are in a separate compartment, and provided the persons who ride in the vehicle with the cylinders are among the group of persons who are going to be using the cylinders (Tr. 122). It was Burge's opinion that Barnett's requiring him to remove the cylinders from the bus or mantrip resulted in USS's taking the cylinders into the mine in a less safe manner than they would have been transported if the cylinders had been taken into the mine in the mantrip where the cylinders were first placed (Tr. 126-127).

8. Barnett, who was from MSHA's Princeton Office, said that he was unaware of the policy expressed by the supervisor from the Pineville Office and that if he had seen USS taking the cylinders into the mine in the manner described by Burge, he would have cited USS for another violation (Tr. 63-64). As a matter of fact, USS violated the policy which had been expressed by the Pineville supervisor because that policy was

that the cylinders had to be transported in a separate compartment (Tr. 122), but Burge stated that the two cylinders had been taken into the mine with the cylinders standing in a semi-upright position and that mechanics were riding in the same compartment with the cylinders and steadying them as they went into the mine (Tr. 127).

9. Barnett said that carrying unsecured cylinders loose on the floor of a mantrip exposed the miners to a possible mine fire or an explosion. A fire could occur if the cover on the valve on an oxygen cylinder should be shaken loose and fall off so as to expose the valve which might be knocked off in a collision or derailment so as to allow the highly compressed oxygen to be released suddenly, thereby transforming the cylinder into a projectile which could fly through the air and injure or kill a miner riding in the bus (Tr. 25; 70-71; 76). Although the valve on an acetylene cylinder is located in a depression in the cylinder so as to require no cover, Barnett said that the valve could become loose from vibration and allow highly explosive acetylene to escape into the atmosphere where it could be ignited by sparks from the trolley wire (Tr. 24; 73).

10. Cox supported Barnett's belief that transporting oxygen and acetylene cylinders was hazardous, but he believed that a collision in the mine or a derailment could cause the cylinders to move about with sufficient force to kill or injure anyone riding in the bus with the cylinders (Tr. 97; 112). Cox referred to the fatal accident which occurred on April 5, 1982, and said that cylinders like the ones involved in this case were found along the rib after that accident. While he did not think that the valves on the cylinders involved in the accident had become loose enough to allow acetylene or oxygen to escape into the air, he still believed that hauling the cylinders in the bus with people going in to work was hazardous (Tr. 98-100).

11. Cox, who is a welder, said that they had tried to accommodate with USS's policy that they haul the cylinders in the vehicle in which they enter the mine when they comprise the crew which is going to be using the cylinders, but he did not think that was a safe practice because the cylinders are not properly secured when so transported and can injure anyone riding in the vehicle with the cylinders in case of derailment or collision (Tr. 96-97; 110).

12. Burge expressed the opinion that transporting the cylinders in a covered mantrip was not reasonably likely to result in a reasonably serious injury. He believed that if the miners had transported the cylinders into the mine in the covered bus or mantrip, there would have been no likelihood of the cylinders causing an injury because the cover or top on the mantrip would have protected the cylinders from coming into contact with any possible falling of electrical wires and from the possibility

of the roof or rib falling upon the cylinders so as to cause them to rupture (Tr. 127; 145).

13. The cylinders which Inspector Barnett had USS remove from the mantrip had been placed in covers made of plastic reinforced with nylon strands (Tr. 124-125). The bags were very thin and Barnett expressed the opinion that the bags were not substantial enough to comply with the regulations [§75. 1106-2(b)] requiring that such cylinders be transported in well insulated containers and the inspector said that he would have issued a citation for another violation as to the kind of covers being used if he had not required the cylinders to be removed from the bus before the cylinders could be transported into the mine in the mantrip (Tr. 73-74). The bags were used primarily by USS as carrying devices and neither Barnett, Cox, nor Burge believed that the bags provided the tanks with any significant impedance from rolling, or would have reduced the extent of injury to anyone who might have been hit by a cylinder thrown about in a collision or derailment (Tr. 70; 76; 94; 99; 124-125).

Consideration of Parties' Arguments

USS's counsel stated at the hearing (Tr. 6) that she was not contesting the question of whether violations had occurred, but only whether the violations were "significant and substantial" as that term has been defined by the Commission in National Gypsum, supra. Citation No. 1066938, here under consideration, alleges that a violation of section 75.1106-2(c) occurred because oxygen and acetylene cylinders were being transported in a mantrip (Finding No. 4, supra). USS's brief (p. 2) claims that the self-propelled personnel carrier [§75. 1403-6], in which the cylinders had first been placed, is not actually a "mantrip" as that term has been defined by MSHA's Pineville Office which has advised USS that a mantrip is one or more cars pulled by a locomotive. The Pineville Office has further advised USS that it may haul oxygen and acetylene cylinders in its buses so long as they are placed in a separate compartment and are accompanied by the personnel who are going to use the cylinders in the mine (Finding No. 7, supra).

USS's brief (p. 2) relies on the Pineville Office's oral interpretation of section 75.1106-2(c) to argue that it could have transported the cylinders in this instance in the bus in which they had been placed if the only persons who had been going to accompany the cylinders had been the personnel who were going to use them (Br. 2). While USS argues that the personnel who would have gone underground in the bus with the cylinders had not yet entered the bus, it is a fact that USS's witness Burge testified (Tr. 122) that he made a specific inquiry to find out who was going to ride in the bus and he said that the people standing around while the inspector examined

the bus consisted of "* * * a roof bolter, or mason, or both, and there were mechanics there." Later Burge stated that the cylinders were removed from the first bus and placed in another bus exactly like the one from which the cylinders were removed, except that the second bus had no tops over the end compartments, and that the cylinders were taken into the mine in the second bus by "[t]he same people that had them in the first bus" (Tr. 123). Subsequently, Burge testified that he had specifically inquired of MSHA's Pineville Office whether a mason could be among the personnel who ride with cylinders and he was advised that the mason would not be one of the persons who would be using the cylinders and that the mason, therefore, could not go into the mine in the same vehicle in which the cylinders were to be transported (Tr. 128).

The only conclusion which can be reached from the above-described contradictory testimony is that either the mason did not go into the mine with the personnel who rode with the cylinders in the second bus, or Burge did not know the occupations of the persons who intended to go into the mine in the first bus. There would have been no reason for Burge to make a specific inquiry as to the occupations of the personnel who were standing around the first bus other than to persuade the inspector that USS would not be violating section 75.1106-2(c) by hauling the cylinders in the first bus because the persons who would be riding in the bus with the cylinders would be the personnel who were going to be using the cylinders. When Burge found that one of them was a mason or a roof bolter, or both, he knew that if that person intended to ride into the mine with the cylinders, USS would be in violation of the Pineville Office's interpretation of section 75.1106-2(c). Therefore, Burge had the cylinders moved to the second bus and the "same personnel" who rode with the cylinders in the second bus necessarily had to exclude the miner whose occupation was roof bolter or mason, or both.

As noted in Finding No. 8, supra, the inspector who wrote the citation was from MSHA's Princeton Office and had not heard of the Pineville Office's interpretation of section 75.1106-2(c) and stated that if he had known that USS took the cylinders out of one bus and placed them in a second bus, also lacking proper restraining devices, he would have cited USS for another violation [§75.1106-2(a)(1)]. It should also be noted that USS violated the policy expressed by the Pineville Office in any event because Burge stated that the cylinders had been placed in the second bus in a semi-upright position and that mechanics rode in the same compartment with the cylinders so as to steady them on the way into the mine. Under the Pineville Office's interpretation, the cylinders were required to be placed in a separate compartment from the personnel who were riding with the cylinders (Finding No. 8, supra).

Burge is correct in arguing that the way the cylinders were actually taken into the mine was more hazardous than the way they would have been taken into the mine if the inspector had not required the cylinders to be removed from the first bus. At least, if they had been taken into the mine in the first bus, the cylinders would have been transported in a compartment with a top over it. While Burge implies that no one would have ridden in the same compartment with the cylinders if Barnett had not required the cylinders to be removed, there is no certainty that miners would not have ridden in the first bus in the same compartment with the cylinders because Barnett said that only three miners were in the bus at the time he examined it and that other miners standing around the bus had not yet been loaded into the bus to make the trip underground (Tr. 24; 68; 72).

There is another flaw about USS's claim that it could lawfully transport the cylinders in the mine under the Pineville Office's oral interpretation of section 75.1106-2(c). That flaw comes from the fact that there is nothing to prevent MSHA from holding that USS's bus is a self-propelled personnel carrier if it is not a mantrip under the Pineville Office's definition of a mantrip being mine cars pulled by a locomotive. As to self-propelled equipment, section 75.1106-2(a) provides as follows:

> (a) Liquefied and nonliquefied compressed gas cylinders transported into or through an underground coal mine shall be:
>
> (1) Placed securely in devices designed to hold the cylinder in place during transit on self-propelled equipment or belt conveyors;

Barnett could just as easily have cited USS for a violation of section 75.1106-2(a)(1) as he did for a violation of section 75.1106-2(c) because the latter section requires that the cylinders not be transported at all on mantrips, whereas USS can only transport such cylinders on its self-propelled personnel carrier if they are "* * * [p]laced securely in devices designed to hold the cylinder in place during transit". Obviously, propping the cylinders in a semi-upright position, steadied by mechanics, is not in compliance with section 75.1106-2(a)(1).

USS's brief (p. 2) asserts that the cylinders "* * * present no hazard if properly secured in correct containers (73)", but USS cites Barnett's testimony in support of that assertion and in that testimony, transcript pages 73 and 74, Barnett states that USS failed to secure the cylinders and that the plastic bags in which USS placed the cylinders were not in compliance with the regulations (Finding No. 13, supra).

USS's brief (p. 5) states that "[i]n order for oxygen and acetylene cylinders to become a hazard during transportation into the mine, they have to receive a blow significant enough

to break the gauges on the ends (24, 25)". While it is true that Barnett emphasized the worst possible hazards which can be expected to occur from transporting unsecured cylinders into the mine, such as a valve being knocked off an oxygen cylinder or gas leaking from an acetylene cylinder so as to be ignited by a spark from a trolley wire (Finding No. 9, supra), Cox testified that the unsecured cylinders could injure a person just by being thrown against him in a collision or derailment (Finding No. 10, supra). Although Cox agreed that the cylinders which were thrown along the rib after a head-on collision occurring on April 5, 1982, did not explode or leak, the fact remains that they left the vehicle in which they had been placed and a 50- or 60-pound cylinder flying through the air in a collision could certainly injure or kill a person who may happen to be in the cylinder's trajectory.

One must keep in mind that the cylinders in this case were first merely laid on the floor of a bus. Then they were removed from that bus and placed in another bus in a semi-upright position. They were actually transported into the mine with mechanics riding in the same uncovered compartment in which the cylinders had been placed. The seats in the buses used by USS are not vertical like those in an automobile, but are built in a reclining position so that the floor of the bus is not a flat place like that in an automobile (Tr. 111-112). In a collision or derailment, there is no seat to protect the person riding with the cylinders from the movement of the heavy cylinders. When miners are riding beside the cylinders, they are exposed to almost certain injury of some kind in case of an accident or even a sudden stopping or starting of the bus.

USS's brief (p. 5) also argues that Barnett could not explain why cylinders hauled into a mine are going to leak as compared with identical cylinders which are hauled daily at construction sites without rupturing. Contrary to USS's claim, Barnett was not bereft of an explanation for the alleged difference in hazards between haulage of cylinders into a mine and haulage of cylinders at a construction site because he stated that cylinders transported at construction sites are "properly secured" (Tr. 70). MSHA's reply brief (p. 2) cites 29 C.F.R. § 1926.350(a) in support of the inspector's claim that cylinders used at construction sites have to be "properly secured". That section provides for cylinders transported in powered vehicles at construction sites to be secured in a vertical position. Of course, as previously noted, section 75.1106-2(a)(1) requires USS to place the cylinders "* * * in devices designed to hold the cylinder in place during transit on self-propelled equipment". Therefore, OSHA's and MSHA's requirements for haulage of cylinders are consistent.

The final defense in USS's brief as to its method of transporting cylinders is as follows (p. 6):

> The unrebutted testimony in this case is that the MSHA district has advised the mine that they can transport these cylinders into the mine if the only people on the vehicle are people who will use the tanks underground (122). If MSHA honestly believes transportation of cylinders on the track mounted vehicles is reasonably likely to result in a reasonably serious injury, it is incomprehensible that it is acceptable if mechanics are injured but not continuous miner operators. Practical experience has shown that a collision of track mounted vehicles is not sufficient to injure the valves on cylinders (98), so there is no reason to believe that the vibration of a portal bus on the track will damage the valves.

I have already pointed out the fallacies inherent in the above allegations, but I shall briefly summarize them at this point. First, the Pineville Office's instructions as to how USS could transport the cylinders was not followed in this case because that Office advised USS that the cylinders could be transported in a vehicle if they were placed in a separate compartment from the mechanics or welders who were going to be using the cylinders, whereas Burge stated that mechanics sat in the compartment beside the cylinders and steadied them on the way into the mine (Finding No. 8, supra).

Second, USS knows that it is using a self-propelled vehicle and both the Pineville Office and USS know, or should know, that section 75.1106-2(a)(1) specifically provides that the cylinders shall be "[p]laced securely in devices designed to hold the cylinder in place during transit on self-propelled equipment". Third, Cox, one of USS's own welders who has been persuaded to haul the cylinders in accordance with the Pineville Office's instructions, testified at the hearing that he believed that taking the cylinders into the mine in accordance with the Pineville instructions is hazardous simply because the cylinders may be thrown against a person in case of a collision or derailment. Cox certainly did not believe the valves had to be knocked off the cylinders before they became a hazard (Finding No. 10, supra).

USS also expresses its inability to comprehend why the Pineville Office would give it instructions as to transporting cylinders which expose mechanics to serious injury if the inspectors from the Princeton Office believe that transporting cylinders in a mantrip would expose a continuous-mining machine operator to serious injury. Although it is obviously hazardous to transport the unsecured cylinders in any vehicle, the Pineville Office's proviso as to the occupational speciality of the personnel who can accompany the cylinders relates to the fact that welders and mechanics who are actually trained in the use of the cylinders will be less likely to be injured in handling

and transporting them than continuous-mining machine operators who normally do not receive training in the handling and use of oxygen and acetylene cylinders.

Insofar as USS appears to defend its placement of the cylinders on the floor of the bus on the Pineville Office's interpretation of section 75.1106-2(c), the Commission has held in Old Ben Coal Co., 2 FMSHRC 2806 (1980), and in King Knob Coal Co., Inc., 3 FMSHRC 1417 (1981), that an inspector is not bound by the provisions of MSHA's inspection manual because the manual is not officially promulgated and does not prescribe rules which are binding on an agency. In the King Knob case, however, the Commission said that there was some merit to King Knob's claim that it had relied upon the provisions set forth in the manual. Inasmuch as the manual fails to state that it is not a source of law binding upon MSHA or the Commission, the Commission said that MSHA's confusion in application of the law in that instance might be taken into consideration in evaluating the criterion of negligence in determining a civil penalty under section 110(i) of the Act.

In this instance, of course, the Pineville Office's interpretation was given orally by a supervisor in that office. At the hearing I granted the request of MSHA's counsel that the record be subject for 72 hours to receipt of additional testimony if an inquiry he was going to make should show an error in USS's representation of the Pineville Office's interpretation of section 75.1106-2(c) (Tr. 185). Since no request was ever made for receipt of further testimony, I assume that USS made a correct statement as to the interpretation given by the Pineville Office. As pointed out above, since the Commission has held that provisions in MSHA's manual do not have the force of binding law, it follows that oral instructions from a single MSHA office do not have sufficient authority to overcome the clear meaning of the regulations themselves.

For the reasons given above, I find that USS did violate section 75.1106-2(c) when it placed the unsecured cylinders in the mantrip or bus for the purpose of transporting them into the mine.

The following definition of a "significant and substantial" violation was given by the Commission in its National Gypsum decision (at page 825):

> * * * we hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

As Finding Nos. 9 and 10, supra, indicate, there was a reasonable likelihood that the cylinders could be tossed about in a collision or derailment and cause a serious injury even if the valves did not get knocked off or become loose so as to expose the miners to being hit by a jet-propelled oxygen cylinder or to being injured by an explosion of leaking acetylene. Barnett said that the jeep in which he was riding was derailed on the day he wrote the citations involved in this proceeding (Tr. 72). The No. 50 Mine has 46 miles of track in it (Tr. 71). It is reasonable to expect that collisions and derailments will occur on a transportation system as extensive as the one here under consideration. Cox testified that "[a]ny time I go into the portal of that mines I'm aware of the fact that there could be a bad accident in the jeep that I'm in" (Tr. 98). The preponderance of the evidence clearly supports a finding that it was reasonably likely that hauling unsecured cylinders in the mantrip or bus could contribute to the cause and effect of a mine safety hazard which could result in an injury of a reasonably serious nature. Therefore, the inspector who wrote Citation No. 1066938 properly considered the violation of section 75.1106-2(c) to be a "significant and substantial" violation.

Assessment of Penalty

Having found above that a violation of section 75.1106-2 (c) occurred, it is necessary that a civil penalty be assessed under the six criteria listed in section 110(i) of the Act. As to the criterion of the size of the operator's business, the parties have stipulated that USS is a large operator and that the No. 50 Mine is a large mine (Tr. 4). Therefore, any penalty assessed should be in an upper range of magnitude to the extent it is determined under the criterion of the size of the operator's business.

As to the criterion of whether the payment of penalties will have an adverse effect on USS's ability to continue in business, the parties made no stipulation and USS presented no financial evidence. In Sellersburg Stone Co., 5 FMSHRC 287, 294 (1983), the Commission indicated agreement with the holdings of the former Board of Mine Operations Appeals in Buffalo Mining Co., 2 IBMA 226 (1973), and Associated Drilling, Inc., 3 IBMA 164 (1974), to the effect that if an operator fails to produce any financial evidence, a judge may presume that payment of penalties will not cause the operator to discontinue in business. In the absence of any facts to support a contrary conclusion, I find that payment of the penalties assessed in this proceeding will not cause USS to discontinue in business.

The parties stipulated that during the 24-month period preceding the citing of the violations involved in this proceeding, USS had been assessed for 288 alleged violations in a total of 1,086 inspection days. Those figures support a finding that USS has a favorable or moderate history of previous

violations. Therefore, only a very small part of the penalty should be attributed to the criterion of respondent's history of previous violations.

Barnett testified that USS demonstrated a good faith effort to achieve rapid compliance after he cited the violation by abating the violation within the time given in his citation (Tr. 20; Exh. 3). It has always been my practice to lower any penalty which I would otherwise assess under the other five criteria if I find that an operator has made an unusual effort to achieve rapid compliance. If the operator abates the violation within the time allowed by the inspector, I neither reduce nor raise the penalty under the criterion of good-faith abatement. Of course, if an operator refuses to abate a violation and has an insufficient reason for failing to abate within the time given, the penalty otherwise assessable under the other five criteria is raised accordingly. In this instance, the inspector wrote the citation at 8:05 a.m. and gave USS until 8:15 a.m., or 10 minutes, within which to abate the violation (Exh. 3). Inasmuch as USS only had to remove the cylinders from the bus or mantrip in order to abate the violation, I find that the inspector provided a sufficient time for abatement and that the penalty should neither be raised nor lowered under the criterion of good-faith abatement.

The fifth criterion to be considered is the degree of negligence which should be assigned to the occurrence of the violation. As I indicated above, the Commission held in the King Knob case that if MSHA's enforcement of a given standard has caused confusion so that the operator violated the standard in the belief that its method of operation was in compliance with MSHA's interpretation of the standard, the inconsistent application of the standard should be taken into consideration in evaluating the criterion of negligence. As has been shown in the preceding portion of this decision, the Pineville Office had interpreted section 75.1106-2(c) in a fashion which caused USS to believe that the cylinders could be transported in a self-propelled personnel carrier so long as the cylinders were placed in a separate compartment and provided the miners in the vehicle carrying the cylinders were a part of the crew of workers who would be using the cylinders.

As I have also indicated above, both the Pineville Office and USS should have been aware of the provisions of section 75.1106-2(a)(1) to the effect that cylinders can be transported in self-propelled vehicles only if "[p]laced securely in devices designed to hold the cylinder in place during transit", but the fact remains that the Pineville Office did mislead USS in giving an interpretation of section 75.1106-2(c) with which the MSHA inspector who wrote the citation did not agree. On the other hand, USS did not actually comply with the Pineville Office's interpretation of section 75.1106-2(c) in that USS failed to place the cylinders in a separate compartment (Finding Nos. 7 and 8, supra).

In such circumstances, I believe that the violation was associated with at least ordinary negligence because USS did not justify its actions in light of section 75.1106-2(a)(1) which clearly does not allow USS to transport cylinders in self-propelled vehicles without placing them in devices designed to hold them in place during transit. The former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434, 442 (1974), that an operator is conclusively presumed to know what the mandatory health and safety standards are. Therefore, before I can find that USS was not negligent at all in violating section 75.1106-2(c), I would need some explanation from USS's witness as to why he did not inquire of the Pineville Office whether transporting unsecured cylinders in a self-propelled vehicle would be in violation of section 75.1106-2(a)(1), assuming that the Pineville Office did not know the difference between a self-propelled personnel carrier and a mantrip which the Pineville Office defined as a locomotive pulling cars designed to transport people, as opposed to transporting coal or supplies.

The final criterion which requires consideration is the gravity of the violation. In this instance, the cylinders were removed from the bus before it traveled underground, but the only reason the cylinders were removed before being transported was that the inspector observed them lying loosely on the floor of the bus and asked that they be removed. In National Gypsum, supra, the Commission noted that the hazard associated with the violation should be analyzed in terms of whether the violation could cause a danger to health or safety. As Finding Nos. 9 and 10, supra, show, transporting the unsecured cylinders in the bus exposed the miners to serious injury or death if the event which section 75.1106-2(c) is designed to prevent had actually occurred.

In view of the fact that a large operator is involved, that payment of penalties will not cause it to discontinue in business, that the operator has a moderate history of previous violations, that the operator showed a good-faith effort to achieve rapid compliance, that the violation was associated with ordinary negligence, and that the violation was serious, I find that a penalty of $250 is appropriate. It should be noted that both MSHA's initial and reply brief suggested that a penalty of $170 be imposed because that was the amount proposed by MSHA in its petition for assessment of civil penalty. Actually, MSHA proposed a penalty of only $119 because the amount of $170 was reduced by 30 percent because USS had abated the violation within the time fixed in Citation No. 1066938. The Commission has held many times that penalty cases before a judge are de novo and that the Commission and its judges are not bound by the penalty formula, set forth in Part 100 of Title 30 of the Code of Federal Regulations, and used by MSHA in proposing penalties (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal

Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U.S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); Peabody Coal Co., 1 FMSHRC 1494 (1979); Co-Op Mining Co., 2 FMSHRC 784 (1980); and Sellersburg Stone Co., 5 FMSHRC 287 (1983)).

In its brief (p. 6), USS argues that a judge must assess the $20 penalty provided for in 30 C.F.R. § 100.4 if he finds that a violation has been improperly evaluated as "significant and substantial" by an inspector. USS acknowledges, however, that if MSHA derives its proposed penalty under section 100.3, as it did in this instance, and the judge agrees with MSHA's finding of "significant and substantial", the judge is not bound by the provisions of section 100.3. Therefore, it is unnecessary in this proceeding for me to discuss USS's contention that I am required to assess a penalty of only $20 if I find that a given violation is not "significant and substantial".

Findings of Fact and Decision as to Citation No. 1066940 dated May 6, 1982

The parties' stipulations which have been summarized at the beginning of the findings of fact for the previous citation are, of course, also applicable to the issues raised by the parties with respect to Citation No. 1066940. The witnesses who testified with respect to both alleged violations were identical, viz., MSHA Inspector Barnett, UMWA Safety Committeeman Cox, and USS's Senior Safety Inspector Burge. Their full names and mining experience have been given above with respect to the previous violation and will not be repeated in this portion of my decision.

The preponderance of the evidence supports the following findings of fact (numbering of paragraphs is continued from previous findings, supra).

14. Inspector Barnett, while engaged in a haulage survey in USS's No. 50 Mine on May 6, 1982, traveled to the B Panel Section. He was accompanied by Cox and Burge. When the jeep in which they were riding reached B Panel, the jeep was brought to a stop behind the portal bus or mantrip which had already delivered miners to the working section. The mantrip was sitting about 40 feet outby the end of the track (Tr. 12; 41; 128; 175). When Barnett got out of the jeep, he observed that the trolley wire was unguarded except for the first 10 or 12 feet of the wire at the end of the track (Tr. 20; 47; 128; 148). Therefore, Barnett wrote Citation No. 1066940 alleging a violation of section 75.1003 because "[t]he trolley wire at the end of the supply track in the B panel section where men and supplies are unloaded was not adequately guarded" (Tr. 11; Exh. 1).

15. Section 75.1003, in pertinent part, provides as follows:

* * * Trolley wires and trolley feeder wires shall be guarded adequately:

(a) At all points where men are required to work or pass regularly under the wires;
(b) On both sides of all doors and stoppings; and
(c) At man-trip stations.

16. Since neither Barnett nor the two men traveling with him had seen the miners on the working section get out of the portal bus or mantrip, none of the witnesses knew for certain where the bus had been sitting at the time the men exited the bus (Tr. 81; 150; 158). It was assumed that the men got off the mantrip at the end of the track because that would have been the safest place for unloading, inasmuch as a guard for the trolley wire had been provided for 10 to 12 feet at the end of the track (Tr. 129). The bus or mantrip was 18 feet long (Tr. 35; 149). The bus had a covered compartment at each end, but the central compartment in the middle of the bus was open or topless (Tr. 46; 155). Each covered end compartment has room for three or four persons and the middle or open compartment will accommodate eight people (Tr. 95; 106). The open part of the bus was exposed to the unguarded trolley wire for part of its length and was exposed to the guarded part of the wire for the remainder of its length (Tr. 155). The jeep in which Barnett rode to the B Panel had no top at all and the persons who got out of the jeep at B Panel were exposed to the unguarded, energized trolley wire when they left the jeep (Tr. 55-56).

17. Barnett considered the violation of section 75.1003 to be a "significant and substantial" violation because he believed that it was reasonably likely that an accident would occur which could reasonably be expected to cause an injury of a reasonably serious nature (Tr. 18). Barnett based the aforesaid conclusion on the fact that the mantrip had been unloaded where a portion of unguarded trolley wire existed, as discussed above, and because he saw supplies along both sides of the track. In such circumstances, he concluded that the miners who unloaded the supplies did so under the unguarded, 250-volt, energized trolley wire (Tr. 16-17). Barnett also believed that the miners from the working section would at some time during each working shift come to the area with the unguarded wire for the purpose of obtaining supplies, such as timbers, rock dust, hydraulic oil, roof bolts, and header boards (Tr. 13-14; 36). In Barnett's opinion, the miners would be beneath unguarded, energized trolley wire when obtaining such supplies (Tr. 45; 54; 56; 84).

18. Burge gave several reasons for his belief that failure to guard the trolley wire was improperly considered by Barnett to be a "significant and substantial" violation. He said that

there was a cut-off switch for turning off power to the trolley wire without affecting the power supply used to run coal-producing equipment (Tr. 132). Burge said that the cut-off switch was located only 160 feet outby the end of the track and that the miners would cut off all power to the trolley wire at any time they found it necessary to obtain supplies which were located close to the trolley wire (Tr. 133; 143-144).

19. Burge testified that he had never heard of any miner who had been injured by contacting an unguarded trolley wire in the No. 50 Mine (Tr. 138). He said he himself had come in contact with an energized trolley wire on one occasion, but the wire hit his miner's safety hat and caused no problem. He also stated that the wire he touched was guarded and that he felt a person was more likely to contact a guarded wire than an unguarded wire because the guarded wires are harder to see than the unguarded wires (Tr. 142; 150).

20. Burge additionally observed that the guards for trolley wires are open at the bottom. In this instance, the 10 to 12 feet of guarding consisted of yellow neoprene (Tr. 140). Burge maintained that the neoprene hangs down on each side of the wire and will protect a person walking along beside the track from coming into contact with the wire, but the opening directly under the guard has to allow for passage of the trolley pole and provides no protection whatever to anyone coming up directly under the guard (Tr. 141-142).

21. Burge described the exact procedure which is used to cut off power to the trolley wire when it is necessary to obtain supplies at any place along the track where supplies are close to the trolley wire. He said that the section foreman will come to the supply area and will direct a miner to turn off the power at the cut-off switch located outby the end of the track. He said that the miner will take the closest vehicle and ride to the switch by going into the track entry at the point where the track ends (Exh. A). When the miner reaches the switch, he will turn off the power to the trolley wire and the lights on his vehicle will go out and he will call out that the power is off. He will stay at the switch to be sure the trolley wire is not reenergized while supplies are being loaded. Then the foreman will tell the scoop operator to get the supplies from along the track. After the supplies have been obtained, the foreman will tell the miner to reenergize the trolley wire and he will turn the power on and the lights on his vehicle will come back on and he will drive his vehicle back to the end of the track (Tr. 164).

22. The hearing in this proceeding was held on May 10, 1983, but both citations under consideration in this case were written on May 6, 1982. Therefore, the hearing was held over a year after the citations were written. Barnett said that this

was the first time he had ever inspected the No. 50 Mine and that his memory of the location of the various types of supplies was not very good (Tr. 29; 34; 173). He was, nevertheless, positive that he saw timbers, rock dust, roof bolts, barrels of oil, grease, and header boards along the track and he insisted that some of them were on the "tight" side, or left side, of the track where the trolley wire was closer to the ribs than the trolley wire was on the "wide" side, or right side, of the track where the wire was farthest removed from the ribs (Tr. 15-16; Exh. 2). Burge was certain that he had observed hydraulic oil in barrels at a point marked with the word "oil" on Exhibit A. Burge marked four other places with the letter "B" on Exhibit A to show where he saw supplies (Tr. 146). Burge also marked a double "X" at the end of the track to show where he had observed six or eight timbers, two bundles of wedges, and four or five cap pieces (Tr. 135; 147).

23. While Barnett conceded that he was not certain as to which side of the tracks he saw various types of supplies (Tr. 34-35; 53), he was certain that some of them were on the "tight" side as well as the "wide" side (Tr. 16; 46; 82; 168; 172-174). While Burge appeared to be certain about all the physical evidence in existence at the time the unguarded trolley wire was cited, he did vary his estimates as to the distance that some supplies were from the trolley wire. For example, he first stated that the hydraulic oil was from 8 to 10 feet from the trolley wire (Tr. 136) and later estimated the distance from the wire to be 17 feet (Tr. 157). Additionally, Burge first said that there were six or eight timbers, two bundles of wedges, and four or five cap pieces at a point marked with a double "X" on Exhibit A (Tr. 135) and later stated that he saw eight timbers and six or eight cap pieces at that same location (Tr. 147). Although a considerable amount of cross-examination was used in trying to discredit Barnett for his lack of memory as to which kinds of supplies were on the "tight", as opposed to "wide", side of the track, Barnett's inability to recall that precise information is not of great importance because Burge testified during direct examination that some supplies were within 3 or 4 feet of the trolley wire and that is close enough to make the loading of supplies a hazardous type of work (Tr. 134).

24. Another aspect of the testimony which conflicted was that Burge stated that there was no stopping at a point one break outby the end of the track as shown by the letter "A" on Exhibit A (Tr. 133; 182). On the other hand, both Barnett and Cox said that there were permanent stoppings between each and every pillar of coal extending along each side of the track entry at the place where the unguarded trolley wire was observed (Tr. 39; 175). Here, again, the variances in the witnesses' recollection as to the existence or nonexistence of the stopping makes no essential difference in determining whether the violation was "significant and substantial" because Burge agreed with Barnett

that it would be reasonable to expect the miners on the working section to pick up some of the supplies by having the scoop operator come into the track entry from the end of the track rather than having the scoop operator come into the track entry through the disputed opening between two pillars (Tr. 133; 144; 161).

25. The unguarded trolley wire was about 5 feet above the mine floor. The beds of the rail cars from which supplies were unloaded were 2-1/2 to 3 feet above the mine floor (Tr. 15; 84). Therefore, when the miners were unloading supplies from the rail cars, their operating space between the beds of the cars and the trolley wire was only about 2-1/2 feet. The floor of the mantrip or jeep in which personnel ride is closer to the mine floor than the beds of the supply cars, so Barnett estimated that miners getting out of a mantrip or jeep have a space of about 4 feet in which to move when getting out of the cars (Tr. 84). They would be in a stooped position when getting out of the cars (Tr. 62). If they should become unbalanced, the normal reaction for a person off balance is to throw his hands up in the air to try to regain his equilibrium. Consequently, a miner could easily get his hand against the trolley wire if he should lose his balance while getting out of a jeep or mantrip (Tr. 63). Even Burge conceded that the miner who moved the bus or mantrip out of the supply area to facilitate the loading or unloading of supplies would be entering or leaving the bus while the unguarded trolley wire was still energized (Tr. 149).

26. Another time when a miner could be exposed to an unguarded, energized trolley wire would be when he goes to the cut-off switch to deenergize the trolley wire before supplies are obtained along the unguarded trolley wire. The basis for the aforesaid observation is that the cut-off switch is on the "tight" side of the track entry where there is little space between the wire and the ribs (Exh. A). A miner taking a vehicle, as described in Finding No. 21, supra, to the cut-off switch would have to travel under the energized wire from the end of the track to the switch, or travel down the opposite "wide" side of the track and then cross the track beneath the unguarded, energized trolley wire, in order to get to the switch. He would have the same exposure to the energized trolley wire while traveling back to the end of the track after reenergizing the trolley wire. Moreover, as Burge recognized (Tr. 161), the scoop or other vehicle driven to the cut-off switch could touch the energized trolley wire so that its frame would be energized. As long as the miner driving the vehicle remained in the vehicle, he would be insulated from the shock hazard by the rubber tires on the vehicle (Tr. 161), but if he should step out of the vehicle to turn off the switch while the frame of the vehicle was still energized, he could be injured or electrocuted when his feet touched the mine floor if any part of his body happened to remain in contact with the scoop's energized frame. Even if he should stay in the energized vehicle, he could be shocked when his hand touched the grounded frame of the cut-off switch to deenergize the trolley wire.

Consideration of Parties' Arguments

USS contends that its failure to guard the trolley wire did not result in a violation which can be considered to be "significant and substantial" as that term has been defined by the Commission in the National Gypsum case, supra. Inspector Barnett based his belief that the violation was "significant and substantial" on his claim that people were exposed to the unguarded, energized wire when they got out of the portal bus or mantrip or any other vehicle, that they were exposed to the wire when they unloaded supplies from the rail cars, and that miners were exposed to the wire when they went to the area of the unguarded wire to obtain supplies which had been unloaded in the vicinity of the track (Finding Nos. 16 and 17, supra).

USS counters Barnett's bases for concluding that the violation was "significant and substantial" by arguing that the guard is open at the bottom and therefore does not protect anyone, such as a motorman, who might touch the wire as a result of rising up directly under the wire (Finding No. 20, supra). USS also contends that only 1 percent of the length of trolley wires is guarded and that, in the vast majority of instances, miners ride under unguarded wires all the time and get out of vehicles under unguarded wires when they work along a track (Br., p. 5).

Although Barnett agreed that the only fatality he could recall resulting from a miner's coming in contact with a trolley wire was "last year" when a motorman contacted a wire and was killed, he still believed that a guard protects a motorman when it is present (Tr. 43). While Barnett also agreed that the guard was not designed to protect the motorman, since he travels under an unguarded wire most of the time, he still believed that the guard protected the motorman for the 1 percent of the time when the guard is present (Tr. 43). Of course, as Barnett emphasized, the citation was written for USS's failure to guard the wire "where men and supplies are unloaded" (Exh. 1). Section 75.1003 does not require guarding for 99 percent of USS's track, so the violation consisted of USS's failure to guard part of the 1 percent of trolley wire which is required to be protected.

For the foregoing reasons, USS's claim that the guard is not designed to protect motormen has little relevance in showing that Barnett improperly classified the violation as being "significant and substantial".

USS stakes its contention that the unguarded wire was not a "significant and substantial" violation on three other claims which are not supported by the preponderance of the evidence. First, USS contends that the bus in which miners traveled to the working section was covered at each end so that the miners riding in each end were protected from the unguarded wire when leaving the bus. No one challenges the fact that the miners

riding in each end of the bus would have been protected, but it is a fact that the center portion of the bus is open and up to 8 miners may ride in the center or open portion of the bus (Finding Nos. 5 and 16, supra). Additionally, USS claims that, in this instance, since the first 10 or 12 feet of the wire was guarded, the open portion of the bus was entirely under the portion of the wire which was guarded (Br., p. 2). USS cites Barnett's testimony at transcript page 36 in support of that assertion, but USS's own witness, Burge, specifically stated that part of the open section of the bus was under unguarded wire (Tr. 155). Therefore, USS's claim that no one was exposed to a portion of unguarded wire when leaving the bus on the day when the citation was written is not supported by the preponderance of the evidence (Finding No. 16, supra).

Second, USS argues that the trolley wire is always deenergized before supplies are unloaded under the wire and that Barnett did not take into consideration USS's policy of deenergizing the wire when he made his determination that miners had unloaded supplies under the unguarded, energized wire (Br., p. 3). Assuming that the miners always deenergize the trolley wire before unloading supplies brought from outside the mine and before obtaining supplies for use on the working section, the miners are still exposed at times to traveling on a regular basis under the unguarded, energized wire. The cut-off switch is on the "tight" side of the unloading area (Finding No. 23, supra; Exh. A). Therefore, miners bringing in supplies on a rail car would have to get off the car under the unguarded, energized wire to turn off the power and, in doing so, would come within 2-1/2 feet of the wire when getting off the car, and would have to repeat that process in order to turn the power back on after unloading the supplies (Finding No. 25, supra).

Any time the miners move the portal bus to facilitate the loading or unloading of supplies, they have to get in and out of the bus under the unguarded, energized wire for the purpose of moving the bus (Tr. 149). If the miners want to obtain supplies located along the track at a point where entry to the track area would have to be from the end of the track, the miner who is ordered to cut off the power and turn the power back on would be exposed to passing under the wire or getting close to it (Finding Nos. 21 and 26, supra). Finally, any time people come to the working section, as Barnett, Cox, and Burge did on May 6, 1982, they are exposed to the unguarded, energized wire when they get out of and return to the jeep in which they have traveled to the section (Finding No. 16, supra).

Another argument USS makes in support of its claim that the violation was not "significant and substantial" is that in order for anyone getting out of a mantrip to come in contact with a trolley wire, he would have to fall backward and up before he could contact the wire (Br., p. 1). That a person might fall

back and up and thereby come into contact with the unguarded, energized trolley wire is an event which is reasonably likely to occur as I have pointed out in Finding No. 25, supra.

USS's claim (Br., p. 5) that its miners would have to forget all of their training in order for an unguarded, energized trolley wire to constitute a "significant and substantial" violation is rejected as not supported by the preponderance of the evidence. Finding Nos. 14, 16-17, and 25-26, supra, clearly show that the violation of section 75.1003 alleged in Citation No. 1066940 occurred and that it was reasonably likely that the violation could have resulted in an injury of a reasonably serious nature. I find that the inspector properly considered the violation to be "significant and substantial" as that term has been defined by the Commission in the National Gypsum case, supra.

Assessment of Penalty

Findings applicable to the instant violation have already been made with respect to three of the six criteria which are required to be used in assessing civil penalties. Specifically, it has already been shown above in assessing a penalty for the previous violation of section 75.1106-2(c) that USS is a large operator, that the Gary No. 50 Mine is a large mine, that payment of penalties will not cause USS to discontinue in business, and that USS has a favorable or moderate history of previous violations.

As to the fourth criterion of whether USS demonstrated a good-faith effort to achieve compliance after the violation of section 75.1003 was cited, Barnett testified that the violation was abated within the time allowed (Tr. 20) and the termination sheet also states that the violation was abated within the time allowed (Exh. 1). As I explained above, it has been my practice neither to increase nor decrease a penalty otherwise assessable under the other five criteria if I find that an operator has abated a violation within the time allowed by the inspector.

As to the fifth criterion of negligence, there is no allegation in this instance, as there was with respect to the previous violation of section 75.1106-2(c), that MSHA's enforcement of section 75.1003 has been confusing because of conflicting interpretations of the same standard. The reason that the trolley wire had not been guarded for the distance required to protect the miners getting into and out of mantrips and other vehicles and while working in the supply area was that the track had been pulled back from the working face. The only guarding consisted of 10 or 12 feet which still existed following the action of removing some of the track closest to the faces of the working section which was engaged in retreat mining at the time

the citation was written (Tr. 34; 133). The fact that 10 or 12 feet of the guarding still remained should have been a reminder to the person in charge of shortening the track that the guarding needed to be extended for a considerable distance outby the place where it then existed. Failure to extend the guarding in such circumstances was the result of a high degree of negligence.

There has already been an extensive discussion of the sixth criterion of gravity. The preponderance of the evidence clearly shows that failure to guard a 250-volt trolley wire which is only 2-1/2 feet above a supply car and 4 feet above personnel carriers is a serious violation because there is always a chance that the miners' protective hats and shoes may not be an adequate shield against shock or electrocution if they happen to touch the energized trolley wire (Tr. 150). After all, even a motorman, under USS's theory, is protected by his hat and shoes from a shock hazard, yet a motorman was killed by coming into contact with a trolley wire (Tr. 43). Miners were also exposed to coming into contact with the unguarded, energized wire when they went to the cut-off switch to turn the power on and off (Finding Nos. 21 and 26, supra). In such circumstances, the preponderance of the evidence supports a finding that the violation was serious.

In summary, the evidence shows that a large operator is involved, that payment of penalties will not cause it to discontinue in business, that it has a moderate history of previous violations, that the violation was associated with a high degree of negligence, and that the violation was serious. Those findings support assessment of a penalty of $750 for the violation of section 75.1003.

WHEREFORE, it is ordered:

(A) The granting (Tr. 5) of the motion by counsel for the Secretary of Labor to withdraw the petition for assessment of civil penalty to the extent that it alleges a violation of section 75.1003 in Citation No. 1066939 is confirmed and the petition is deemed to have been withdrawn with respect to the violation of section 75.1003 alleged in Citation No. 1066939.

(B) U. S. Steel Mining Co., Inc., shall, within 30 days from the date of this decision, pay civil penalties totaling $1,000.00 for the violations of section 75.1106-2(c) alleged in Citation No. 1066938 ($250) and section 75.1003 alleged in Citation No. 1066940 ($750).

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 30 1983

JOSEPH D. BURNS, Complainant	:	COMPLAINT OF DISCRIMINATION (Fee Application)
v.	:	Docket No. YORK 82-19-DM
ASARCO, INC., Respondent	:	Manchester Unit

DECISION

Statement of the Case

This case is before me on complainant's application for attorney fees 1/ pursuant to section 105(c)(3) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3). The fee application is the final phase of a discrimination complaint filed by Joseph D. Burns against ASARCO, Incorporated, a large multinational non-ferrous metal company.

From 1973 to March 1981, Burns was employed as a repairman at ASARCO's Manchester Unit, an open-pit illemite mine located in Lakehurst, New Jersey. One of Burns' duties was to repair a floating suction dredge utilized to extract alluvial sands from a water-filled pond approximately 65 feet deep.

On March 20, 1981, Burns was instructed by his foreman, Thomas Wheeler, to repair cracks in the cross braces of a dredge ladder. Burns refused to do the work because the ladder was improperly braced and stabilized and he feared for his safety. As a result, he was discharged for insubordination.

1/ While the accepted practice is to use the word "attorney" as a noun in either the singular or plural possessive, I find it simpler to use it as an adjective.

Believing his refusal to work was a protected activity within the meaning of section 105(c)(1) of the Mine Act, Burns filed a complaint with the Mine Safety and Health Administration (MSHA). Nine months later, MSHA advised Burns that his disciplinary discharge did not constitute a violation of section 105(c)(1) of the Act. Persisting in the belief that he was unlawfully discharged, Burns filed a complaint pro se with the Commission. In February 1982, perfecting amendments to the complaint were received and after ASARCO filed its answer in March the matter was assigned to this trial judge. The trial judge requested a copy of the MSHA investigative report. Upon its receipt, copies were furnished the parties together with an order to furnish additional pretrial information. 2/ The prehearing conference scheduled for July 22, was continued and reset for September 21 when complainant succeeded in engaging the firm of Terris & Sunderland of Washington, D.C. on a pro bono basis. Representing complainant thereafter were Philip G. Sunderland, a partner in the firm and David A. Klibaner, an associate.

Burns' counsel quickly familiarized themselves with the case and on August 12, 1982 endeavored to initiate settlement discussions with William O. Hart, counsel for ASARCO. When Mr. Hart rebuffed these overtures, they were renewed on August 30 and again on September 20, the day before the prehearing/settlement conference.

In each instance, Mr. Hart unequivocally rejected settlement discussions because "ASARCO felt strongly that the complainant was insubordinate, that he was attempting to harass the company and get whatever monies he could from the company through the very liberally worded (and interpreted) discrimination provisions of the Act." At the conference, Mr. Hart was not prepared to consider the strengths and

2/ In pro se cases, particularly, the trial judge believes the decisionmaker has a "duty of inquiry" which imposes an obligation to scrupulously and conscientiously explore all relevant facts. Inherent in the concept of a due process hearing is the trial judge's obligation, especially in cases involving unrepresented parties, to inform himself of all facts relevant to his decision. Goss v. Lopez, 419 U.S. 465, 580 (1975); Heckler v. Campbell, 51 L.W. 4561, 4564, n. (1983), (concurring opinion of Justice Brennan).

weaknesses of his case. His excuse was that in five and one-half years of practice before OSHRC and FMSHRC he was never before expected to have reviewed the facts of his case before appearing at a prehearing/settlement conference.

What transpired at the conference of September 21, convinced Mr. Hart to review his case carefully and discuss it with his employer. His concern was triggered by his belief that complainant would be able to establish a prima facie case and thus would be likely to prevail on the merits. Nonetheless settlement attempts during October and November were unproductive, the parties disagreeing on the amount of backpay for overtime to which Burns was entitled, and the necessity for treating complainant's damage claim separately from the claim for attorney fees in any settlement. On December 3, 1982, four days before the date set for trial in Toms River, New Jersey, the parties agreed to bifurcate the matter by settling Mr. Burns' claim for $4,000 and leaving the question of attorney fees and expenses for determination by the trial judge.

Thereafter, counsel for Burns submitted a fully documented fee application and a reply to ASARCO's opposition. Supplementing the application is a memorandum in support thereof, an affidavit by Philip Sunderland, and copies of all time sheets and expense receipts pertaining to the work done by Terris & Sunderland personnel on the Burns case. Applicants ask for $11,011.14 in fees and expenses resulting from 170.25 hours of work.

Respondent submitted a generalized opposition to the application claiming the case was so simple, obvious and straightforward that any award should be limited to not more than $2,000. After consideration of the application, opposition and reply, I determined respondent had not supported with sufficient particularity its challenge to the number of hours expended and issued an order requiring respondent to show cause why the application should not be granted. Respondent filed its response on July 22, 1983.

The following chart summarizes the amounts claimed by Terris & Sunderland for Attorney fees and expenses:

WORK CATEGORIES	HOURS 3/	AMOUNT
I - Initial Preparation	30.75	$2,325.00
II - Preparation of Proposed Stipulations of Fact, Conclusions of Law and Proposed Findings of Fact and Conclusions of Law	27.25	1,835.00
III - Hearing Preparation	40.25 4/	2,511.25
IV - Calculation of Damages	16.25	596.25
V - Settlement Discussions	10.00	718.75
VI - Subpoenas	4.75 5/	315.00
VII - Preparation of Attorney Fees Application	41.00 6/	2,402.50
Total	170.25	$10,703.75
	Expenses	307.39
	Total	$11,011.14

3/ These figures do not include 35 hours of time eliminated from the fee request by applicants in the exercise of "billing judgment."

4/ ASARCO's response to the show cause order suggests the total for categories I, II, and III of 98.25 hours was excessive because this work "to a large extent, merged into the general subject of becoming acquainted with the record." This was not time spent becoming acquainted with an existing record, it was time spent in preparing for trial. It was the thoroughness of this preparation that convinced ASARCO to rethink its intransigent position with respect to settlement.

5/ Nothing in ASARCO's discursive submittals specifically challenges the time spent on categories IV, V, and VI.

6/ The only specific challenge is to the time spent in preparing applicants' supporting memorandum. I consider the time well spent since it contributed greatly to my understanding of the context against which this dispute must be resolved. The discussion of the principles that underlie the lodestar approach was directly relevant to ASARCO's claim that the fees sought are disproportionate to the amount recovered. I can find nothing in the record to support the assertion that ASARCO was prepared to stipulate that the hourly rate was reasonable. On the contrary, ASARCO suggests that at one time it felt the hourly rate should not exceed $60.00. It was not until after the application was prepared and filed that ASARCO conceded the hourly rates were reasonable.

The trial judge has reviewed the fee application in considerable detail and concludes (1) ASARCO failed to show any of the time claimed was excessive or unreasonable, (2) the fair market value of the services rendered is the amount claimed, $11,011.14 plus interest from the time the application was filed.

Market Value Formula

While the Commission has not addressed the question, 7/ the Supreme Court and the federal courts of appeal have held that under statutes that provide for public interest enforcement the award of fees to prevailing parties should include compensation (1) for all time reasonably expended, (2) at rates that reflect the full market value (hourly rates) for such time. Hensley v. Eckerhart, 51 L.W. 4552, 4554-4555, 4558 (1983); Copeland v. Marshall, 614 F.2d 880, 890-900 (D.C. Cir. 1980) (en banc); Lindy Bros. Bldrs. v. American Radiator Standard Sanitary Corp., 540 F.2d 102, 112-118 (3d Cir. 1976); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974); Laffey v. Northwest Airlines, C.A. 2111-70, (D.D.C., July 29, 1983). Under this formula, known as the Copeland III or market value formula, the number of hours reasonably expended is multiplied by the applicable hourly rates for the attorneys to arrive at the "lodestar" calculation. Copeland, supra, 641 F.2d at 891. A reasonable hourly rate is defined as that prevailing in the community for similar work. Id. at 892. Once established, the lodestar may be adjusted upward or downward to reflect the characteristics of the case (or counsel) for which the award is sought. A premium is usually awarded if counsel would have received no fee if the suit was unsuccessful, unless the hourly rate reflects that factor. In addition, the lodestar may be increased or decreased to recognize a delay in payment or legal representation of superior or inferior quality. Id. at 892-894. In multi-claim proceedings no fee is recoverable for services on unsuccessful claims. Henseley, supra.

7/ In Glen Munsey, 3 FMSHRC 2056 (1981), rev'd in part and remanded Glen Munsey v. FMSHRC, No. 82-1079, D.C. Cir. 1983, Judge Stewart used the market value or Copeland III approach in awarding fees and expenses of $26,462.50 on a recovery of $2,858.26. See also Joseph D. Christian, 1 FMSHRC 126 (1979) ($26,231.32 awarded in attorney fees and expenses on a recovery of $12,072.52); Council of the Southern Mountains, Inc., 3 FMSHRC 526 (1981), appeal pending, ($14,108.32 awarded in fees and expenses on a recovery of $626.69).

In evaluating fee applications the trial judge is required to exercise considerable discretion and to articulate his analysis as clearly as possible. Unless the end product falls outside a rough "zone of reasonableness," or unless the explanation articulated is patently inadequate, a reviewing authority as a matter of sound judicial administration will not disturb the trial judge's solution to the problem of balancing the many factors that have to be taken into account. Cf. Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968). To accomplish the statutory purpose attorneys must feel confident they will receive fair compensation for their efforts when they are successful. By the same token, operators must be assured that judicial oversight and discretion will be exercised to prevent "windfalls." 8/

Burden of Proof

Recognizing that the analytical framework established by the market value formula places a difficult, sometimes onerous, burden on the trial judge 9/ the courts have held this burden can only be lightened by placing on the fee applicant a "heavy obligation" to document the various facets of his claim. To meet this burden and to establish the time expended was reasonable, the fee application must contain detailed information about the hours logged and the work done. Nat. Ass'n of Concerned Vets. v. Sec. of Defense, 675 F.2d 1319, 1323-1324 (D.C. Cir. 1982). While the fee application need not present "the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney," the application must be sufficiently detailed to permit the

8/ The attorney fees remedy is actually an independent cause of action designed by Congress to facilitate litigation by otherwise unrepresented litigants in furtherance of more effective enforcement--enforcement essentially freed of the bureaucratic, political and fiscal constraints that otherwise impairs agency enforcement. The existence of this remedy encourages miners to perform their deputized police function, gives operators a strong incentive to comply and tends to deter unnecessary protraction of public interest litigation.

9/ In Council of Southern Mountains, Inc., supra, Judge Steffey complained of having to spend "weeks" evaluating a fee application, apparently assuming the entire burden of doing so was on him. On the other hand, in Glen Munsey, supra, Judge Stewart found that allocation to the parties of the Copeland III burden greatly facilitated his disposition of the matter.

trial judge to make an independent determination of whether the hours claimed are justified. Id. at 1327. Casual, after-the-fact estimates are insufficient. Attorneys who anticipate making fee applications must maintain contemporaneous, complete and standardized time records which accurately reflect the work done. 10/ Ibid. The application should also indicate whether nonproductive time or time expended on unsuccessful claims was excluded. 11/

Once a properly documented application is submitted, the burden shifts to the party opposing the fee award, who must submit facts and detailed affidavits to show why the applicants' request should be reduced or denied. 12/ Donnell v. United States, 682 F.2d 240, 250 (D.C. Cir. 1982); Concerned Veterans, supra, at 1337-1338 (concurring opinion of Judge Tamm). Opposing counsel must frame his objections with particularity and specificity. The trial judge is not expected sua sponte to "inquire into the reasonableness of every action taken and every hour spent by counsel, and will consider objections to filed hours only where [he] has been presented with a reasonable basis for believing the filing is excessive." Donnell, supra, at 250. It is not enough for opposing counsel to state the hours claimed are excessive and/or the rates too high and expect the trial judge to make a line item audit and assume the burden of making the particularized showing necessary to support such a conclusory position. Concerned Veterans, supra, at 1338, Copeland, supra, 903.

ASARCO did not seek discovery to support its assertion that the hours claimed were excessive. It simply asserts that the application as presented and supported was too vague and indefinite to permit a rational evaluation.

10/ This requirement may have to be flexibly applied in Commission proceedings that involve attorneys or parties that do not have the resources to maintain such records. Compare Kling v. Dept. of Justice, 2 MSPB 620 (1980) with O'Donnell v. MSPB, 2 MSPB 604 (1980).

11/ Here applicants state 35 hours of time was excluded in the exercise of "billing judgment" which I assume means time considered largely unproductive. Because the nature of the work and the individuals involved were not specified, I have disregarded this factor in evaluating the fee application.

12/ Discovery is, of course, available to assist a party in preparing his opposition. Discovery requests should be precisely framed and promptly advanced before final opposition papers are filed. Unfocused requests serve no useful purpose and will be denied. If discovery is pursued for purposes of delay or other improper purposes the final award may take that into account. Compare, Concerned Veterans, supra, at 1329.

ASARCO concedes Burns was the prevailing party, the reasonableness of applicants' hourly rates and the applicability of the lodestar or market value method of evaluating the application.

The sole challenge made is to the reasonableness of the number of hours claimed for the particular services performed. My independent analysis concludes the hours claimed were reasonable in view of the difficulties encountered in developing the necessary support for complainant's prima facie case and ASARCO's total lack of cooperation in limiting, until after the fact, the issues to be considered in deciding the fee application.

Hours Reasonably Expended

Sufficiency of the Application

Applicant's submission was sufficiently detailed to permit opposing counsel to conduct an informed appraisal of the merits of the application or to file a detailed and focused request for any discovery deemed essential to permit such an attack. The trial judge's analysis finds that, in accordance with the market value formula, the application includes a breakdown and itemization within seven categories of the work performed, an affidavit describing in adequate detail the work actually performed by counsel and the paralegals, the time sheets of the attorneys and paralegals who performed the work, documentation of the expenses claimed and resumes of the qualifications and attainments of the lawyers involved. From this data, detailed schedules for each attorney and paralegal who worked on the case listing specific tasks performed (e.g., "prehearing conference," "prepare stipulations," "draft findings," "draft FOIA request," "calculate damages,""discuss settlement," "research and prepare fee affidavit") were compiled. In addition, applicants submitted a supporting memorandum and a response to ASARCO's opposition. Each of these documents were independently researched in order to evaluate their worth and to form my own independent view of the many procedural, policy and factual issues presented 13/ in this the first separately contested fee application submitted to the Commission under

13/ No pleading by pleading evaluation was made of the underlying case file. In Copeland, supra, at 903, the court held it is neither practical nor desirable to expect the trial court to examine each paper in the case file to decide whether it should have been prepared or could have been prepared in less time.

the market value formula. 14/ I find ASARCO's claim that the application is too conclusory to permit anything other than a generalized attack lacking in merit.

As the courts have admonished, fee contests should not be allowed to evolve into exhaustive trial-type proceedings or result in a second major litigation. Henseley, supra, at 4555; Concerned Veterans, supra, at 1324; Copeland, supra at 896, 903. If each victory on the merits is but the prelude to an all-out war over the reasonableness of the fee claimed attorneys may be deterred from pro bono representation of miners asserting their rights to be free of unlawful coercion, retaliation, interference, and discrimination. Should this occur, the legislative purpose will be frustrated. 15/

Challenges to the Lodestar

ASARCO's opposition and its response to the show cause order reflect its disdain for the whole proceeding and smack more of a dilatory, blunderbuss attack than a well conceived, lawyerlike, challenge. That opposing counsel allegedly chose to spend only 32 to 45 hours in defending the case may be of interest to his employer but is hardly the measure of

14/ In view of the amounts involved in both the claim on the merits and the fee application, my initial reaction was that the litigants should settle the amount of the fee. I was somewhat shocked, therefore, to find they were so far apart. My "displeasure" over this difference--and not the amount of either--caused me to urge the parties to stipulate away some of their differences and to attempt further settlement discussions.

15/ In view of the number of cases in which the Solicitor declines prosecution that are later found to be meritorious in public interest proceedings, it is obvious the agency's enforcement policy leaves much to be desired. During the last 18 months, miners refused protection by the Labor Department were filing cases at almost three times the rate of filing by the agency. Most of these miners are unrepresented but must appear against experienced attorneys representing the operators. This puts a tremendous strain on the trial judge charged, as he often is, with both developing and at the same time trying the facts. See note 2, supra.

the effort reasonably warranted in behalf of a complainant. 16/ The trial judge is not in a position to take such a bald assertion seriously. 17/ As a basis for comparison not only is it irrelevant, it is also wholly undocumented.

After all, if applicants did not win they got nothing, whereas opposing counsel would be on the corporate payroll regardless of the outcome. 18/ In a case he did not believe he could win and with generous authority to settle at any time, opposing counsel chose to sit back and let complainant's counsel "sweat it out."

The fact that opposing counsel chose to spend so little time in preparation for both the pretrial and the trial is more a commentary on his own evaluation of the lack of merit of his defense than a basis for criticizing the efforts by complainant's counsel. It is true, of course, that the Solicitor's finding of no violation gave opposing counsel some grounds for complacency and complainant's counsel considerable cause for concern. With this concern in mind, applicants were hardly in a position to take the matter of trial preparation lightly. Counsel working on a contingent fee basis, unlike counsel who work on a guaranteed salary basis, have to make money the old fashioned way. They have to earn it. I reject, therefore, the "invidious comparison of time expended" approach espoused by opposing counsel as a sound basis for reducing or denying any of the time claimed by applicants.

ASARCO's claim that 170 hours is far too much for a "straighforward" case such as this is equally without merit. As respondent admits there were seven disputed issues of fact, several of which turned on the credibility of opposing, extremely hostile witnesses. This case had to be prepared in the manner of all classic swearing matches--leave no stone unturned to develop information useful in impeaching the opposition's witnesses, and thoroughly prepare your own witnesses for a rigorous cross examination. In view of the number of witnesses involved (12 to 15) and

16/ Casual, after-the-fact estimates of time expended by opposing counsel are no more acceptable than those by fee applicants.

17/ Sworn, undocumented assertions are not a lawyerlike way to establish time expended in a matter.

18/ The total absence of a risk factor makes time expended by opposing counsel an unacceptable calculus of the time expended by complainant's counsel.

the incentive for them to be selective in their testimony, I cannot conscientiously find that the 98.25 hours of time expended in preparation for the trial of this matter was by any reasonable standard excessive.

The proposed stipulations and proposed findings of fact challenged were contemplated by the pretrial orders. Their function was to clarify and narrow the issues in order to save trial time. It is undisputed that respondent's counsel depended heavily on applicants' work product in preparing his own proposed findings. It hardly lies in opposing counsel's mouth, therefore, to argue that the time expended, 27.25 hours, was unnecessary. My review of these proposals shows applicants did a thorough, competent and responsible job, particularly with respect to the damage calculations. I am unable to conclude that the time expended was unreasonable. Certainly respondent has furnished no probative basis for my doing so.

If anything, I find the work performed by the paralegals in calculating the damages was extremely efficient considering the difficulties they encountered. Reconstructing complainant's overtime in the face of respondent's reluctance to cooperate was no mean feat. I cannot fault the 16.25 hours expended for this work.

Respondent has not questioned the 10 hours spent in settlement discussion. Nor has any question been raised about the 4.75 hours expended in preparing subpoenas for witnesses. The extra work involved in persuading the Department of Labor to allow the MSHA Special Investigator to appear was certainly time well spent even though his appearance later became unnecessary. His prospective appearance was obviously a factor that contributed to the settlement.

The claim that time spent in trial preparation on and after October 7, 1982, was unnecessary is without substance. 19/ Counsel admits that shortly after the pretrial conference of September 21, 1982, ASARCO authorized him to settle the matter for $5,000. Despite this, he delayed making the offer until applicants called him on October 7 and proposed

19/ Mr. Hart was warned that unless the matter was settled a heavy expenditure of time would be necessary to prepare for trial.

settling the matter for $7,000. 20/ Mr. Hart rejected this but countered with an offer to settle both claims for $4,000. When the counteroffer was rejected, applicants again proposed separating the damage claim from the fees claim and to settle the former for $5,750. This was on November 22, 1982. Mr. Hart considered the proposal "insulting" and never responded.

In the meantime, applicants were expending considerable time in preparation for the trial which had been set for December 7, 1982. On the eve of trial, December 3, 1982, Mr. Hart suddenly reversed his position and thereafter the parties agreed to settle complainant's claim for $4,000 and to submit applicants' fees for determination by the trial judge.

While attorney fee applications are closely related to the merits proceeding, they are at the same time more akin to separate causes of action. It is the mixed nature of such proceedings that gives rise to much misunderstanding and procedural floundering. ASARCO's claim that applicants' refusal to take their fees and expenses out of a common fund was a ploy to prolong unnecessary trial preparations shows a lack of sensitivity to the relevant ethical and tactical considerations. The Code of Professional Responsibility prohibits an attorney from representing a client where the lawyer's personal financial interest may be in conflict with that of his client. DR 5-101(A). Thus, where a lump sum settlement is offered to cover both damages and fees the lawyer and his client are invited to compete over how the fund shall be shared. This creates a conflict of interest which is best avoided and resolved by settling the two claims separately. Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977); Mendoza v. United States, 623 F.2d 1338, 1352-1353 (9th Cir. 1980); Obin v. Dis. 9 of Intern. Ass'n. etc., 651 F.2d 574, 582 (8th Cir. 1981).

It was not, therefore, improper for applicants to insist that the fees question be decided separately from the settlement on the merits. Further, it would be contrary to the legislative purpose to force miners to absorb attorney fees and expenses or to allow operators to force their attorneys to compete with their clients for reimbursement for such fees and expenses.

20/ At that time it appears the attorney fees may have amounted to only $3,000.

Counsel for ASARCO was aware from the beginning that applicants were reluctant to take a discounted common fund settlement and were insisting on separating the two issues. At any time on or after October 7, 1982, Mr. Hart could have saved the expenditure of time for trial preparation by agreeing to bifurcate the matter. Applicants were duty bound to continue their preparation until the matter was settled. The pressure of such preparation and the imminence of the trial date undoubtedly encouraged reversal of ASARCO's position with respect to separation of the issues. To deny or reduce the hours spent in trial preparation would unfairly penalize applicants and encourage a practice inimical to the purpose of the statute and high professional standards.

For reasons previously stated, ASARCO's objection to the time spent in preparing applicants' supporting memorandum is denied. 21/ Once Mr. Hart made the decision to require applicants to prepare and file a fully supported lodestar application rather than to stipulate with respect to matters that have subsequently been conceded, applicants in the exercise of responsible professional judgment had no choice but to follow the applicable precedents and to furnish the trial judge and the Commission with a fully articulated rationale for awarding the same fees that would be charged a fee-paying client under the market value approach. 22/

The hourly rates of $90 for Mr. Sunderland, $65.00 for Mr. Klibaner, and $25.00 for the paralegals are not contested

21/ Note 6, supra. Time reasonably devoted to obtaining attorney fees is, of course, itself subject to an award of fees. Environmental Defense Fund v. EPA, 672 F.2d 42, 62 (D.C. Cir. 1982).

22/ ASARCO, of course, cannot expect the trial judge to protect it against actions by its own counsel that increased its exposure to liability for complainant's fees and expenses. Operators should not be given an incentive to protract litigation in which miners seek to vindicate rights guaranteed by the statute. The prospect of liability for fees and expenses should deter not only violations of the statute but obviate any incentive to litigate imprudently. Copeland, supra, at 899.

and are certainly reasonable. 23/ No request is made for an increase in the lodestar due to the contingent nature of the arrangement because the billing rate already includes an allowance for that contingency.

I find the quality of representation was at the level of skill normally expected for attorneys practicing at these rates and that no upward or downward adjustment in the lodestar is called for on the basis of the results achieved. 24/ To account for the delay in payment, however, the award should include interest at the market rate from the date of filing of the application. Donnell, supra at 254; EDF v. EPA, supra, at 51-52; Copeland, supra, at 893; Concerned Veterans, supra, at 1329. Interest, of course, reflects the time-value of money. That when coupled with what I find is a fully compensable hourly rate for all hours reasonably expended constitutes the full market value of the services rendered.

Expenses, which were undisputed, amounted to $307.39.

23/ There is no claim or showing that the associate's efforts were unorganized, wasteful, or duplicative or that the associate's labors were inadequately supervised by the partner. The ratio of the associate's time to the partner's time (3:1) is within an acceptable zone or reasonableness.

24/ The suggestion that the fee claimed is disproportionate to the monetary relief obtained reflects a basic misunderstanding of the fee remedy. The purpose of the fee provision is to give miners victimized by discrimination the resources to vindicate their rights through litigation. Attorneys who undertake such representation face not only the risk of losing but also the fact that in most instances the monetary recovery is relatively modest. It is comparatively easy to obtain competent counsel when the litigation is likely to produce a substantial monetary award. It is much more difficult to attract counsel when a substantial part of the relief sought is intangible and nonmonetary. Here the nonmonetary effect of the litigation is a deterrent to future acts of retaliation against miners who refuse to work under unsafe conditions. If that results in preventing one fatality or one disabling injury the socio-economic purpose of the statute and the litigation will be achieved and will more than justify the fee claimed. "Fee awards that produce substantial nonmonetary benefits must not be reduced simply because the litigation produced little cash." Copeland, supra, at 907.

Order

The premises considered, it is ORDERED that on or before Thursday, September 15, 1983, ASARCO, Incorporated pay attorney fees and expenses in the amount of $11,011.14 with interest at the rate of 12% per annum from the date of the fee application, February 15, 1983, to the date of payment to the law firm of Terris & Sunderland, 1526 18th St., N.W., Washington, D.C., and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 31, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 83-57-M
	:	A.C. No. 20-00801-05501
v.	:	
	:	Nugent Sand Mine
NUGENT SAND COMPANY, INC., Respondent	:	

FURTHER ORDER TO SUBMIT INFORMATION

On August 8, 1983, I issued an order disapproving the Solicitor's motion for settlement with respect to three of the six violations involved in this matter. With respect to these three which are assessed at $20 apiece, I ordered the Solicitor to submit additional information sufficient for me to determine whether the proposed penalties are justified.

The Solicitor has now submitted an amended motion. Unfortunately, this motion also is inadequate. With respect to Citation No. 2088974, absence of a fire extinguisher on a front-end loader, the Solicitor advises that there was no likelihood of injury and a moderate degree of negligence. He does not, however, furnish any reasons to support these conclusions. Indeed, the relevant boxes on the citation are not even checked. I have previously stated that the mere checking of the boxes does not constitute a sufficient basis upon which I could approve settlement. However, the absence of even these checks leads me to wonder how the Solicitor reached the conclusions set forth in this motion.

With respect to Citation No. 2088975, the absence of a guard on a take-up pulley, the Solicitor advises that there was a low degree of negligence and no likelihood of injury. However, once again no reasons were given to support these conclusions. Moreover, the boxes were not even checked on the citation form. The same is also true of Citation No. 2088976 with respect to which the Solicitor states there is low negligence and no likelihood of injury.

I very much regret having to send this case back to the Solicitor. However, the Commission has its statutory responsibilities to fulfill and cannot rubber stamp bare conclusions especially where as here, the citations on their face do not appear to support the Solicitor's representations.

Accordingly, the amended settlement motion is disapproved and the Solicitor is Ordered to furnish further information within 30 days of the date of this order adequate for me to determine whether the three proposed $20 penalties are justified.

Paul Merlin
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 31, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 83-80-M A.C. No. 20-00038-05504
v.	:	
MEDUSA CEMENT COMPANY, Respondent	:	Medusa Cement Company Plant

DISAPPROVAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the one violation in this case for the original assessment of $56.

Citation No. 2089073 was issued for a violation of 30 C.F.R. § 56.16-6 because the covers on oxygen and acetylene cylinders being transported were not in place to protect the stems of the cylinders. The Solicitor states that the operator demonstrated no negligence but he gives no basis for this assertion. The Solicitor further states that the violation was significant and substantial but again he gives no reasons. I note that the inspector stated on the citation that falling materials from the conveyors could easily strike one of the stems and create a serious hazard. The inspector checked boxes indicating occurrence was reasonably likely and could reasonably be expected to result in lost workdays or restricted duty.

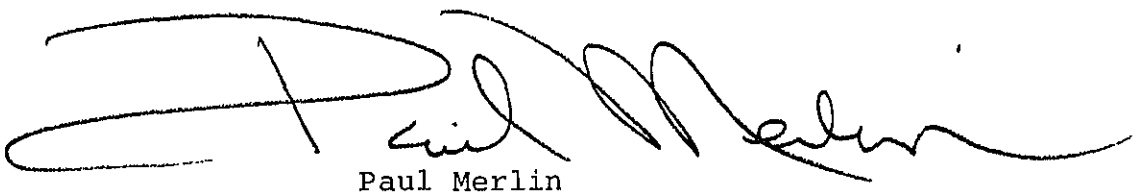
I have recently held in many other cases that the term "significant and substantial" is irrelevant in a penalty proceeding before the Commission. Such a proceeding before the Commission under section 110 of the Act is entirely de novo. Whether or not the Secretary looks to the present definition of "significant and substantial" does not affect these proceedings. Here the relevant criterion is gravity. Moreover, I also have stated that I cannot base a settlement approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor.

The Solicitor has told me nothing about size, prior history, or ability to continue in business.

Under section 110(i) of the Act I am charged with the responsibility of determining an appropriate penalty in light of the six specified criteria. The Solicitor has not even mentioned most of these criteria and where he has, he either gives no reasons (negligence) or misstates the standard (gravity).

The Solicitor must tell me why $56 is an appropriate penalty in light of the six statutory criteria. The fact that this was the originally assessed amount is not, of course, determinative in this de novo proceeding.

Accordingly, the settlement motion is Denied and the Solicitor is Ordered to submit the necessary information within 30 days from the date of this order.



Paul Merlin
Chief Administrative Law Judge

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